148 US 345

RECORD, CASE No. 13,599.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., ~~391.~~ 64

LEVI ANKENY, PLAINTIFF IN ERROR,

vs.

VAN BUREN CLARK.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF WASHINGTON.

FILED AUGUST 9, 1889.

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INDEX.

	Original.	Print.
Transcript from district court	1	1
Summons	1	1
Sheriff's return	2	2
Complaint	4	2
Answer	5	3
Reply	10	6
Motion for change of venue	14	9
Order transferring cause	16	9
Order commencing trial	17	10
Verdict	18	11
Order as to hearing on motion for new trial	19	11
Order overruling motion for new trial	19	11
Judgment	19	12
Order on notice of appeal	21	12
Clerk's certificate	21	13
Bill of exceptions and statement of facts	22	13
Defendant's requests to charge	22	13
Certificate of register and receiver at Walla Walla	25	15

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 8, 1892.

	Original.	Print.
Letter of Commissioner to register and receiver at Walla Walla, November 17, 1880	26	15
Stipulation as to facts	28	16
Letter of V. P. Clark to Levi Ankeny, November 16, 1886	31	17
Bond of Ankeny to Clark	31	18
Charge to jury	33	18
Motion for new trial	34	19
Statement of facts	40	22
Testimony of V. B. Clark	41	23
William Stanfield	43	24
Milton Aldrich	44	24
Levi Ankeny	45	25
J. L. Sharpstein	46	26
B. L. Sharpstein	46	26
V. B. Clark (recalled)	47	26
E. K. Hanna	47	27
Exceptions of defendant	48	27
Charge	50	28
Stipulation as to statement	51	28
Judge's certificate	51	29
Exhibit A—Map	52	29
B—Map	53	29
Certificate to map and letter	54	29
Letter, Commissioner to register and receiver, August 16, 1881	54	29
Opinion	56	30
Petition for writ of error and allowance of same	67	36
Prayer for reversal	69	37
Affidavit of value	70	37
Assignment of errors	72	38
Bond	74	38
Citation (copy)	76	39
Proof of service of citation	77	40
Argument and submission	78	40
Judgment	78	41
Order granting writ of error	79	41
Petition for writ of error	80	41
Prayer for reversal	83	42
Affidavit of value	85	42
Assignment of errors	87	43
Bond	90	44
Writ of error	94	45
Citation (original)	97	46
Proof of service of citation	99	46
Clerk's certificate	101	47

1 TERRITORY OF WASHINGTON, } ss:
County of Walla Walla,

In the District Court of the Territory of Washington and for the First Judicial District Thereof, Holding Terms at Walla Walla for the Counties of Walla Walla and Franklin, in said Territory.

VAN BUREN CLARK, Plaintiff,
vs.
LEVI ANKENY, Defendant.

Summons.

The United States of America to Levi Ankeny, defendant:

You are hereby required to appear in an action brought against you by Van Buren Clark, plaintiff, in the district court of the Territory of Washington and for the first judicial district thereof, holding terms at Walla Walla for the counties of Walla Walla and Franklin, in said Territory, to answer the complaint of plaintiff, filed in Walla Walla county, within twenty days after the service of this summons, exclusive of the day of service, if served in said counties; if not served in said counties but in said district, in thirty days; if served in any other judicial district in the Territory, in forty days; if served by publication, within sixty days after first publication of this summons, or the said plaintiff will take judgment against you by default, according to the prayer of the complaint.

The cause and general nature of this action is as follows, to wit:

2 This action is brought to recover judgment against the said defendant for the sum of six thousand three hundred and eighty-three dollars and forty-one and two-thirds cents, for wheat delivered to the said defendant between the 23rd day of September, 1883, and the 10th day of October, 1885.

Said wheat amounted to twelve thousand seven hundred and sixty-seven and one-third bushels, and it was reasonably worth the sum of fifty cents per bushel.

Wherefore plaintiff prays judgment against the said defendant for the sum of six thousand three hundred and eighty-three dollars and forty-one and two-thirds cents, together with interest thereon, at the rate of ten per cent. per annum, from the 10th day of October, 1885, until paid, and for his costs and disbursements herein.

All of which more fully appears from the complaint of plaintiff on file herein.

[SEAL.] Witness the Hon. Wm. G. Langford, associate justice of the supreme court of Washington Territory and judge of said court, and the seal thereof, affixed this 19th day of March, A. D. 1887.

ALFRED N. MARION, *Clerk,*
By ARTHUR G. MARION, *Deputy.*

ALLEN, THOMPSON & CROWLEY AND
E. K. HANNA, *Plaintiff's Attorneys.*
1—391

TERRITORY OF WASHINGTON, }
County of Walla Walla, } *ss:*

Sheriff's Return.

3 I, Archer S. Bowles, sheriff of Walla Walla county, Washington Territory, do hereby certify that I served the within summons and annexed complaint on the within-named defendant, Levi Ankeny, in Walla Walla county, Washington Territory, on the 19th day of March, A. D. 1887, by then and there delivering to said defendant, personally, a copy of said summons, and that I at the same time and place delivered to said defendant, personally, with said copy of summons, a copy of complaint in said action, certified to be such by the clerk of the district court, holding terms at Walla Walla, under the seal thereof.

ARCHER S. BOWLES,
Sheriff Walla Walla County, W. T.,
By CHAS. A. LAMPKINS, *Deputy.*

Endorsed: Case No. 4782. Van Buren Clark, plaintiff, *vs.* Levi Ankeny, defendant

Filing Summons.

Returned and filed this 30th day of March, A. D. 1887.

ALFRED N. MARION, *Clerk,*
By ARTHUR G. MARION, *Dep-ty.*

Sheriff's fees:

Serving 1 cop*ies* at $1.00	$1 00
Making summons	1 00
Mileage, 2 miles, at 10 cts.	20
Certificate	20
	2 40

In the District Court of the Territory of Washington and for the First Judicial District Thereof, Holding Terms at Walla Walla in and for the Counties of Walla Walla and Franklin.

Complaint.

4 VAN BUREN CLARK, Plaintiff, }
vs. }
LEVI ANKENY, Defendant. }

Plaintiff, complaining of defendant, for cause of action alleges:

1st. That between the 23rd day of September, A. D. 1883, and the 10th day of October, A. D. 1885, both inclusive, plaintiff sold and delivered to defendant, at the county of Walla Walla, Washington Territory, twelve thousand seven hundred and sixty-seven and one-third bushels of wheat.

2nd. That the same was and is reasonably worth the sum of fifty cents per bushel, or in all six thousand three hundred and eighty-three dollars and forty-one and two-thirds cents, lawful money of the United States.

3rd. That the said defendant has not paid the said sum of six thousand three hundred and eighty-three dollars and forty-one and two-thirds cents or any part thereof, although the same is long since due and payable.

Wherefore plaintiff demands judgment against the said defendant for the sum of six thousand three hundred and eighty-three dollars and forty-one and two-thirds cents, lawful money of the United States, together with interest thereon, at the rate of ten per cent. per annum, from the 10th day of October, A. D. 1885, until paid, and for costs and disbursements herein.

E. K. HANNA AND
ALLEN, THOMPSON & CROWLEY,
Attorneys for Plaintiff.

TERRITORY OF WASHINGTON, }
County of Walla Walla, } *ss:*

5 Van Buren Clark, being first duly sworn, deposes and says that he is the plaintiff in the above action, knows the contents of the foregoing complaint, and the same is true as he verily believes.

VAN BUREN CLARK.

Subscribed and sworn to before me March 19th, A. D. 1887.

D. J. CROWLEY,
[SEAL.] *Notary Public.*

Endorsed: No. 4782. In district court, Walla Walla county. Van Buren Clark, pl'ff, *vs.* Levi Ankeny, def't. Complaint.

Filing Complaint.

Filed March 19, 1887.

ALFRED N. MARION, *Clerk*,
By ARTHUR G. MARION, *Deputy.*

In the District Court of the Territory of Washington and for the First Judicial District Thereof, Holding Terms at Walla Walla for the Counties of Walla Walla and Franklin, in said Territory.

VAN BUREN CLARK, Plaintiff, }
vs. }
LEVI ANKENY, Defendant. }

Answer.

The defendant, answering the complaint of the plaintiff in the above-entitled action, denies each and every allegation in said complaint contained.

6 First. That on the 20th day of October, 1882, the plaintiff, for value received, made, executed, and delivered to the defendant a certain note in writing in the words and figures following, to wit:

WALLA WALLA, W. T., *Oct.* 20*th*, 1882.

For value received I promise to pay to Levi Ankeny or order twelve thousand (12,000) bushels of good, merchantable wheat, said wheat to be delivered to the owner of this note at any railroad station in Walla Walla county, W. T., and payments to be made as follows: On or before Oct. 15th, 1883, four thousand bushels; on or before October fifteenth, 1884, four thousand bushels, and on or before October 15th, 1885, four thousand (4,000) bushels; the owner of this note to furnish sacks for said wheat.

VANBUREN CLARK.

Second. That at the same time and place the plaintiff duly made, executed, acknowledged, verified, and delivered to defendant a certain chattel mortgage in the words and figures following, to wit:

Know all men by these presents that Vanburen Clark, of the county of Walla Walla and Territory of Washington, mortgagor, for and in consideration of seven thousand dollars, in gold coin, to him in hand paid by Levi Ankeny, of the county of Walla Walla and Territory of Washington, mortgagee, the receipt where*by* is hereby acknowledged, ha*ve*, and by these presents do-, sell, assign, convey, and set over unto the said Levi Ankeny and to his
7 heirs and assigns all the following-described personal property, to wit: All the crops of grain that shall be raised or grown on the northeast quarter of section 19 and the northwest quarter of section 20, in township 8 north, of range 37 east, in the county of Walla Walla and Territory aforesaid, in the years 1883, 1884, and 1885; which conveyance is nevertheless made to secure the payment of 12,000 bushels of wheat, 4,000 on or before Oct. 15th, 1883, 4,000 on or before the 15th of Oct., 1884, and 4,000 on or before Oct. 15th, 1885, according to the conditions of a certain chattel note made by the said mortgagor to the said mortgagee, of even date herewith, which note is given for the use and occupation of said premises and to secure the said mortgagee the rents, use, and profits of the same, the said mortgagee being the *the* owner of the same; and if such payment be made, then this conveyance to be void. But it is expressly agreed by the parties that if the said property or any part thereof be removed from Walla Walla county or in any way interfered with or molested, or if the said mortgagee shall from any cause deem himself insecure, then, in either event, the said indebtedness shall immediately become due and collectible, notwithstanding the provisions of said note to the contrary, and the mortgagee may immediately proceed to foreclose this mortgage, and have and take all necessary proceedings to sell said property, and retain and apply the proceeds thereof to the payment of said indebtedness and interest and the costs and expenses of such proceedings and sale and the sum of three hundred dollars as attorney's fees in said suit or proceedings, which the mortgagor covenants and agrees to pay in case any suit or proceedings be instituted to collect said note or any part thereof.

In witness whereof the said mortgagor has hereunto set his hand and seal this 20th day of October, 1882.

8 VANBUREN CLARK. [SEAL.]

Signed and executed in presence of—
B. L. SHARPSTEIN.
E. H. MORRISON.

TERRITORY OF WASHINGTON, } ss:
County of Walla Walla,

I, B. L. Sharpstein, a notary public in and for the Territory and county aforesaid, do hereby certify that on this 20th day of October, A. D. 1882, before me personally appeared Vanburen Clark, whose name is subscribed to the foregoing mortgage, to me personally known to be the same person described in and who executed the same, and acknowledged to me that he executed the same freely and voluntarily for the use and purpose therein expressed.

In witness whereof I have hereunto set my hand and notarial seal the day and year in this certificate above written.

[SEAL.] B. L. SHARPSTEIN,
Notary Public.

TERRITORY OF WASHINGTON, } ss:
County of Walla Walla,

Vanburen Clark, the mortgagor in the foregoing mortgage named, being first duly sworn, deposes and says that the aforesaid mortgage is made in good faith and without any design to hinder, delay, or defraud creditors.

VANBUREN CLARK.

Subscribed and sworn to before me this 20th day of October, 1882.

[SEAL.] B. L. SHARPSTEIN,
Notary Public.

Third. That said chat*tle* mortgage was duly recorded on the
9 23rd day of October, 1882, in the county auditor's office of Walla Walla county, Washington Territory, in Book "D," Chat*tle* Mortgages, at page 364, records of said county, and all the wheat delivered to defendant by plaintiff was delivered and received as payment on said note and not otherwise.

Wherefore defendant demands judgment for his costs and disbursements in this action.

B. L. SHARPSTEIN.
Attorneys for Defendant.

TERRITORY OF WASHINGTON, } ss:
Walla Walla County,

I, Levi Ankeny, being first duly sworn, say I am the defendant in the above-entitled action; that I know the contents of the foregoing answer and believe the same to be true.

LEVI ANKENY.

Subscribed and sworn to before me this 26th day of March, 1887.

[NOTARIAL SEAL.] J. L. SHARPSTEIN,
Notary Public.

Endorsed: No. 4782. Vanburen Clark, plaintiff, *vs.* Levi Ankeny, defendant. Answer.

Filing Answer.

Filed in the office of the clerk of the district court this 5th day of April, 1887.

10 ALFRED N. MARION, *Clerk,*
By —— ——, *Deputy,*

B. L. & J. L. SHARP-EIN,
Attorneys for Defendant.

In the District Court of the Territory of Washington and for the First Judicial District Thereof, Holding Terms at Walla Walla for the Counties of Walla Walla and Franklin, in said Territory.

VANBUREN CLARK, Plaintiff,
vs.
LEVI ANKENY, Defendant.

Reply.

Said plaintiff, by way of reply to the answer on file herein, admits the execution and delivery of the note and chattle mortgage set forth in said answer, but denies that all or any of the wheat delivered to defendant by plaintiff was delivered or received as payment on said note; and by way of a further reply to said answer plaintiff alleges:

1st. That on the 20th day of October, 1882, the said defendant agreed to sell to plaintiff, and plaintiff agreed to purchase from said defendant, certain real estate for the agreed price of twelve thousand bushels of wheat, upon the delivery of which to defendant said defendant undertook, covenanted, and promised to convey to plaintiff, his heirs and assigns forever, by a good and sufficient deed of conveyance, with the usual covenants of warranty, the said real estate, together with all and singular the tenements and appurtenances thereunto belonging, the terms and conditions of 11 which said contract are more fully set forth in a certain bond, under seal, for a deed duly executed and acknowledged by said defendant on said day and by him delivered to plaintiff, of which the following is a copy:

Know all men by these presents that I, Levi Ankeny, am held and firmly bound unto Van Buren Clark in the penal sum of $10,000.00; for the payment of which sum, well and truly to be made, I bind myself, my heirs and executors, firmly by these presents.

Sealed with my seal and dated this 20th day of October, A. D. 1882.

The conditions of the above obligation are such that whereas the above obligor has sold and agreed to convey to the above obligee the following-described real estate in Walla Walla county, Washington Territory, to wit:

The northeast quarter of section 19 and the northwest quarter of section 20, in township eight north, of range thirty-seven east, of the Willamette meridian, subject to a mortgage for $3,000.00 and interest thereon from Sept. 1st, 1882, which said Clark is to pay when and as due, on the payment by the obligee to the obligor of 12,000 bushels of wheat according to the terms of a certain wheat note of even date herewith, made by obligee to the obligor:

Now, therefore, if the said obligor shall, upon the payment of said wheat note, convey said premises to the obligee, his heirs or assigns, subject to said mortgage for $3,000.00, then this obligation to be void; otherwise to be and remain in full force.

Said payment, however, to be a condition precedent; and a failure to make any payment at the time or in the manner specified in said note shall discharge the said obligor from all obligation to convey the said premises and the obligor may immediately take possession of said premises, and all crops on said premises shall be 12 owned and held by the obligor each year until the payment specified in said note for said year has been fully made.

LEVI ANKENY. [SEAL.]

In presence of—
WM. STINE.
B. L. SHARPSTEIN.

TERRITORY OF WASHINGTON, } *ss:*
County of Walla Walla, }

I, B. L. Sharpstein, a notary public in and for the Territory and county aforesaid, do hereby certify that on this 20th day of October, A. D. one thousand eight hundred and eighty-two, personally appeared before me Levi Ankeny, whose name is subscribed to the foregoing instrument, to me personally known to be the same person described in and who executed the said instrument, and he acknowledged to me that he executed the same freely and voluntarily for the use and purposes therein expressed.

[SEAL.] B. L. SHARPSTEIN,
Notary Public.

That at the time of the execution and delivery of the said instrument, and as a part of the said contract, and as a means of evidencing and securing said agreed purchase price for said land, the plaintiff executed and delivered the note and mortgage in said answer set forth, and that there was no other consideration for said note and mortgage or either of them.

That said plaintiff performed all the terms and conditions of said contract on his part to be performed and duly delivered to 13 defendant all the said wheat by him to be delivered according to the terms thereof, and that said defendant so received the same.

That after the said plaintiff had so performed said contract in the delivery of said wheat to defendant he duly demanded of defendant that defendant convey said real estate to plaintiff as by his said bond he had undertaken to do.

That said defendant then and there neglected and refused so to do, and has ever since and still does neglect and refuse to grant and convey said premises to plaintiff by any good or sufficient deed, and that said defendant has no title to the northeast quarter of section nineteen, in township eight north, of range 37 east, of said real estate, and since the making of his said contract was not the owner or seized in fee or at all of said land. Plaintiff alleges that the wheat mentioned and described in his complaint, except the excess thereof over the requirement of said bond, is the purchase price of said land advanced and paid by plaintiff to defendant, and that by reason of his said neglect and refusal and inability to perform the said contract the said defendant became and is indebted to plaintiff for the reasonable value of said wheat, and that such demand constitutes the cause of action in the complaint pleaded.

Wherefore plaintiff asks judgment as in the complaint.

E. K. HANNA AND
ALLEN, THOMPSON & CROWLEY,
Attorneys for Plaintiff.

TERRITORY OF WASHINGTON, }
County of Walla Walla, } *ss:*

Van Buren Clark, being first duly sworn, deposes and says that he is the plaintiff in the above action, knows the contents of the foregoing reply, and the same is true as he verily believes.

VAN BUREN CLARK.

Subscribed and sworn to before me May 7th, A. D. 1887.

[NOTARIAL SEAL.] D. J. CROWLEY,
Notary Public.

14 *Service of Reply Accepted.*

We hereby accept service of the within and foregoing reply this 9th day of May, A. D. 1887.

B. L. & J. L. SHARPSTEIN,
Att'ys for D'f'ts.

Endorsed: No. 4782. Van Buren Clark, plaintiff, *vs.* Levi Ankeny, defendant. Reply.

Filing Reply.

Filed in the office of the clerk of the district court this 9 day of May, A. D. 1887.

ALFRED N. MARION, *Clerk,*
By —— ——, *Deputy.*

E. K. HANNA AND
ALLEN, THOMPSON AND CROWLEY,
Attorneys for Plaintiff.

In the District Court of the Territory of Washington and for the First Judicial District Thereof, Holding Terms at Walla Walla for the Counties of Walla Walla and Franklin, in said Territory.

VAN BUREN CLARK, Plaintiff,
vs.
LEVI ANKENY, Defendant.

Motion for Change of Venue.

15 Now comes the defendant in the above-entitled action and moves the court to change the place of trial of the said action for the following reasons, to wit:

First. Because the Hon. William G. Langford, judge of this court, has been of counsel for the plaintiff in the above-entitled action in relation to the subject-matter involved in this action.

Second. Because the said judge of this court was, before his appointment as such judge, attorney for the said plaintiff in relation to the identical question in controversy and matters involved in this action.

B. L. & J. L. SHARPSTEIN,
Attorneys for Defendant.

Service of Motion Accepted.

Due service of the foregoing motion — this 7th day of May, 1887.

E. K. HANNA,
Of Attorneys for Plaintiff.

(Endorsed:) Van Buren Clark, plaintiff, *vs.* Levi Ankeny, defendant. Motion. No. 4782.

Filing Motion.

Filed May 7, 1887.

ALFRED N. MARION, *Clerk,*
By —— ——, *Deputy.*

B. L. & J. L. SHARPSTEIN,
Attorneys for Defendant.

In the District Court of the Territory of Washington and for the First Judicial District Thereof, Holding Terms at Walla Walla for the Counties of Walla Walla and Franklin, in said Territory.

16 VAN BUREN CLARK, Plaintiff,
vs.
LEVI ANKENY, Defendant.

Order Transferring Cause to the District Court at Sprague.

Now, on this day, this cause coming on to be heard, and the plaintiff appearing by E. K. Hanna, Esq., and Messrs. Allen, Crowley and Thompson, his attorneys, and defendant by B. L. and J. L. Sharpstein, his attorneys, and it appearing that the Hon. Wm. G. Langford, now judge of this court, is disqualified to try this case by reason of his having been, before his appointment, attorney for plaintiff in this action:

Now, therefore, by stipulation and agreement of the parties in open court, it is ordered that this cause be, and is hereby, transferred to the district — of the fourth judicial district, holding terms at Sprague.

TERRITORY OF WASHINGTON, } *ss:*
County of Walla Walla, }

Certificate of Transcript.

I, Alfred N. Marion, clerk of the district court of the Territory of Washington and for the first judicial district thereof, do hereby certify that the above and foregoing is a true and correct transcript of journal entry in the above-entitled cause as the same appears on file in my office.

17 In testimony whereof I have hereunto set my hand and affixed the seal of said court this 3d day of November, A. D. 1887.

[SEAL.] ALFRED N. MARION, *Clerk,*
By —— ——, *Deputy.*

Endorsed · No. 4782. Van Buren Clark, plaintiff, *vs.* Levi Ankeny, defendant. Copy of journal entry.

Filing Certificate.

Filed in the office of the clerk of the district court this 3d day of November, A. D. 1887.

ALF*ERD* N. MARION, *Clerk,*
By —— ——, *Deputy.*

Filing in District Court at Sprague, W. T.

Filed in the office of the clerk of the district court, at Sprague, on the 11th day of November, A. D. 1887.

D. A. CLEMENTS, *Clerk,*
By CHAS. B. JOHNSTON, *Deputy.*

In the District Court of Washington Territory and for the Fourth Judicial District Thereof, Holding Terms at Sprague, in Lincoln County, said Territory.

FRIDAY, *November* 11*th*, 1887.

V. B. CLARK, Plaintiff, }
vs. } 137. Jury Empannelled and Taking of Testimony for Plaintiff Concluded.
L. ANKENY, Defendant. }

Jury Empanneled.

18 And now comes the plaintiff, by his attorneys, and also comes the defendant, by his attorneys; and thereupon, to try

the issue joined between the said plaintiff and defendant, comes a jury of good and lawful persons, to wit, Charles Nelson, Fred. Timm, M. L. Brooks, Bernard Burke, John Leonard, Alex. Campbell, Peter O'Connor, L. D. Humphreys, Charles Babcock, M. Clinton, Wm. B. Kelley, H. M. C. Messenger, who were duly empanneled, tried, and sworn; and thereupon commenced the testimony of witnesses for plaintiff, which was concluded.

SATURDAY, *November* 12*th, A. D.* 1887.

V. B. CLARK, Plaintiff,
vs.
L. ANKENY, Defendant.
} 137. Jury & Verdict for Plaintiff for $6,915.50.

Jury and Verdict.

And now comes the jury heretofore empanneled in this cause into open court, and the roll of the jury being called by the clerk and all having answered to their names, the foreman of the jury presents to the court the following verdict:

"We, the jury in the case of Van Buren Clark, plaintiff, against Levi Ankeny, defendant, find for plaintiff for six thousand nine hundred and fifteen & $\frac{50}{100}$ dollars.

M. CLINTON, *Foreman.*"

19 SATURDAY, *November* 12*th, A. D.* 1887.

V. B. CLARK, Plaintiff,
vs.
LEVI ANKENY, Defendant.
} 137.

Motion for new trial filed, and hearing of the same continued, with leave to parties to call same up for consideration in vacation.

Motion for New Trial.

And now comes the defendant, L. Ankeny, by his attorneys, and files motion for a new trial in this cause, which leave is granted by the court. It is ordered by the court that the hearing of said motion and argument of counsel be continued, with leave to parties to call same up for consideration in vacation, at chambers.

In the District Court of the Fourth Judicial District of Washington Territory, Holding Terms at Sprague.

VAN BUREN CLARK, Plaintiff,
vs.
LEVI ANKENY, Defendant.
} 137.

Motion Overruled; Judgment for Plaintiff.

And now, on this 16th day of March, A. D. 1888, the motiom for a new trial in said cause coming on to be heard at chambers, before the judge of said court, at Spokane Falls, in said judicial district, by the mutual consent of the parties, *and* the same, being duly considered, is now here overruled and disallowed, and therefore, 20 said plaintiff moving for judgment on the verdict on file herein, and it appearing that he is entitled thereto, and it also appearing that said verdict is in the aggregate amount of six thousand nine hundred and fifteen & $\frac{50}{100}$ dollars, $6,915.50, being six thousand three hundred and eighty-three & $\frac{50}{100}$ dollars ($6,383.50), the agreed value of the wheat and interest on said amount to the date of said verdict, November 11th, 1887, and that plaintiff is entitled to interest on said principal sum of $6,383.50 from said 11th day of November, 1887, at the lawful rate, being $212.78, making *on* the aggregate seven thousand one hundred & twenty-eight & $\frac{28}{100}$ dollars, and both parties waiving objection on account of the rendition of judgment at chambers—

It is therefore now here adjudged and considered that said plaintiff do have and recover of and from said defendant the sum of seven thousand one hundred and twenty-eight & $\frac{28}{100}$ dollars, with lawful interest thereon from the date hereof, together with the costs and disbursements in this action, to be taxed, and that execution issue therefor.

March 16th, 1888.

GEORGE TURNER, *Judge.*

Filed March 16, 1888.

In the District Court of the Territory of Washington and for the Fourth Judicial District Thereof, Holding Terms at Sprague.

VAN BUREN CLARK, Plaintiff,
vs.
LEVI ANKENY, Defendant.
} 137. At Chambers.

21 *Notice; Appeal.*

And now in court, held at chambers, in said fourth judicial district, immediately after rendition of judgment in the above-entitled action in favor of plaintiff and against defendant, the plaintiff being present in court by his attorneys, Messrs. Allen and Crowley, and the defendant, by his attorneys, Messrs. B. L. & J. L. Sharpstein, the defendant by his attorneys, gave notice to the plaintiff, his said attorneys, and all others, that he doth appeal the above-entitled action to the supreme court of Washington Territory, and requested that said notice be entered upon the journal of this court; and the court being fully advised *on* the premises, and the attorneys of the respective parties being present in court and not objecting, the court ordered that the said notice be so entered upon the journal, which is hereby done.

March 16th, 1887.

GEORGE TURNER, *Judge.*

Filed March 16, 1888.

TERRITORY OF WASHINGTON, }
Fourth Judicial District, } *ss:*

I, Chas. B. Johnston, clerk of the fourth judicial district court of Washington Territory for the counties of Lincoln and Adams, holding terms at Sprague, in Lincoln county, said Territory, do hereby certify that the foregoing is a full, true, and correct transcript of so much of the record in the above-entitled cause as I am by statute required on appeal to transmit to the supreme court.

[SEAL.] In testimony whereof I have hereunto set my hand and the seal of said district court this fourth day of May, 1888.

CHAS. B. JOHNSTON, *Clerk.*

22 V. B. CLARK, Plaintiff, }
vs.
LEVI ANKENY, Defendant. }

Defendant requests the court to instruct the jury as follows:

1. The plaintiff must recover, if he can recover at all, upon the cause of action stated in his complaint and not upon what is stated in his reply to defendant's answer.

The cause of action stated in his complaint *if* for wheat sold and delivered by him to defendant.

The pleadings, proofs, and admissions of the parties show that this wheat was delivered only as payment upon a certain contract as the purchase price of certain real estate. These facts are inconsistent with the allegations of the plaintiff's complaint, do not sustain such allegations, and your verdict should be for defendant.

Refused. G. T.

2. The plaintiff could not rescind the contract mentioned in his reply without placing or offering to place the defendant in the 23 same situation as to the property and his rights that he, defendant, was in at the time of the execution of the contract of purchase, unless that had been rendered impossible by the act of the defendant.

Refused. G. T.

3. Plaintiff could not rescind the contract without accounting or offering to account for the rents and profits of the land agreed to be sold while he was in possession of the same.

Refused. G. T.

4. If the plaintiff knew the nature of defendant's title to the land at the time he did any act under the contract, such as delivering wheat as a part payment of the purchase price, he could not thereafter rescind the contract on account of failure of title (if such there be), and could not for that reason recover the purchase price.

Refused. G. T.

5. If plaintiff, by himself or by his attorneys, informed defendant that he would not receive a quitclaim deed or bargain-and-sale deed,

defendant need not tender such a deed, as the law will not require a man to do an idle thing.

Refused. G. T.

6. A bargain-and-sale deed is all defendant would be required to tender or deliver if he had title, and would be a sufficient compliance with the terms of the contract on his part.

Refused. G. T.

24 7. There is no evidence that defendant had not a good title to the land contracted to be sold.

Refused. G. T.

8. The act of Congress of July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern rout-;" the filing of the map of definite location under said act; the building and completion of said railroad under said act to Wallula; the examination of the same by commissioners, and acceptance by the President of the United States gave to the Northern Pacific Railroad Company a fee-simple title to all land included within the limits of said grant to Wallula, to which point said road is completed.

Refused. G. T.

9. You are instructed that the land in question, viz., N. E. ¼ sec. 19, town. 8 north, of range 37 east, is within the limits of the Northern Pacific land grant as earned by the completion of the road to Wallula.

Refused. G. T.

10. If the Northern Pacific Railroad Company had title to the land described in the deeds to defendant, such deeds gave defendant such title.

Refused. G. T.

11. If defendant had title, a quitclaim deed would convey the same to plaintiff. 25

Refused. G. T.

12. If defendant had title a bargain-and-sale deed would pass not only that title but any title thereafter acquired by defendant.

Refused. G. T.

13. If plaintiff, by himself or by his attorneys, notified defendant that he would not accept a deed, except a general warranty deed with full covenants, it would have been idle for defendant to have tendered any other deed, and if any other deed would have satisfied the condition of the bond defendant would have been by this declaration of plaintiff excused from tendering the same.

Refused. G. T.

In the United States Land Office at Walla Walla, Washington Territory.

TERRITORY OF WASHINGTON,
County of Walla Walla, } *ss:*

We, R. Guichard, register, and James Braden, receiver, respectively, of the United States land office at Walla Walla, Washington Territory, do hereby certify that the annexed map and letter, together with the legends and endorsements thereon, are true
26 and correct copies of that certain map and letter, together with the legends and endorsements thereon, received and filed in said office at the time the same purports to have been received and filed and now on file in said office.

Dated Walla Walla, W. T., November 8th, 1887.

R. GUICHARD, *Register.*
JAMES BRADEN, *Receiver.*

(Copy.) ("F.")

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Nov.* 17, 1880.

Register & receiver, Walla Walla, Washington Ty.

GENTLEMEN: The Northern Pacific Railroad Company, under the act of July 2, 1864, has filed a map of definite location of its line of route from a point near Wallula, in the Territory of Washington, to a point near Spokane Falls, in said Territory. The said map was received in this office from the Secretary of the Interior, with referred letter from George Gray, general counsel for said railroad company, dated the 1st ulto., on the 4th ultimo, on which last-named date, by the terms of the grant, the right of the company attached to the odd sections in the "granted" or forty-mile limits, according to the definite location.

I enclose herewith a diagram showing the line of road as
27 definitely located, the corresponding forty-mile limits designated by blue lines and the fifty-mile limits designated by vermillion lines.

The diagram also shows the former withdrawals ordered by letter of March 30, 1872, for the main line, and the letter of July 3, 1879, for the branch line. The former, on the line of general route within the limit of forty miles, designated by a brown (green) line. The said withdrawals of 1872 and 1879 will remain effective as heretofore, except as hereinafter set forth.

The only effect of this adjustment as to lands in your district is as follows:

The even-numbered sections to the east of the road and lying between the blue line marked "40-mile limits" and the vermillion line marked "50-mile limit," heretofore held at double the minimum price, you will now reduce to minimum ($1.25 per acre) under the pre-emption laws.

The odd-numbered sections lying between the vermillion line marked "50-mile limit" and the brown line marked "40-mile limit (temporarily)," heretofore withdrawn, you will restore to entry at the minimum rate, and the even-numbered sections in the same limit will also be subject to pre-emption at the minimum rate.

Under the act of March 3, 1879, homesteads on the reserved even-numbered sections will be permitted to the full extent of 160 acres, irrespective of the limits in which the lands entered may be situated.

In order to carry the above restoration into effect you
28 will cause a notice to be published in the newspaper having
the largest circulation in your district that upon a day to be fixed by you, and not less than thirty days from date of notice, the lands to be restored will again become subject to pre-emption and homestead entry. This notice will be published and paid for in the usual manner, and when published send copy to this office.

Please acknowledge the receipt of letter and diagram.

Very respectfully,
(Signed) J. A. WILLIAMSON,
Commissioner.

In the District Court of the Fourth Judicial District of Washington Territory, Holding Terms at Sprague.

V. B. Clark, Plaintiff,
vs.
Levi Ankeny, Defendant.

It is hereby stipulated and agreed by and between the parties to the above-entitled action that the following are facts in the above-entitled action and are admitted as such without proof:

1. That that certain map of definite location hereto attached, marked "Ex. A," by agreement, and that certain map hereto attached, marked "Ex. B," by agreement, together with the accompanying letters thereto attached, were rec'd and placed on file in the
United States Land Office at the times they and each of them
29 purport to have been received and filed and are the copies
they respectively purport to be.

2. That the main line of the Northern Pacific Railroad Company was constructed and completed in the year 1880, on the route and line indicated and laid down on the aforesaid maps, to Wallula, and after examination and report by commissioners, as provided in the act of Congress, duly appointed for said purpose, "said road was accepted by the President of the United States, as provided in said act."

3. That on May 30, 1881, the Northern Pacific Railroad Company duly made, executed, and delivered to Perter Huff a warranty deed for the northeast quarter of section 19, township 8 north, range 37 east.

4. That on December 13th, 1881, the said Peter Huff, together with his wife, duly made, executed, and delivered to the defendant a warranty deed for the said northeast quarter of said section 19.

5. Plaintiff delivered to defendant the following wheat at the following dates, to wit: 4,167 bushels December, 1883, and 8,600 bushels September, 1885; and said wheat was delivered by plaintiff to defendant and accepted by def't in pursuance of the terms of the bond set out in plaintiff's reply and as the purchase price of said land in said bond described; that 767 bushels of said wheat was, after the delivery, ascertained to be in excess of the amount called for by the terms of said contract, and that the value of all of said wheat was and is fifty cents per bushel.

6. That defendant delivered to plaintiff the possession of the land described in said bond on the date of said bond.

30 7. That on November 16th, 1886, plaintiff served on defendant a notice, which is hereto attached, marked " Ex. C," and within ten days thereafter quit possession of said land, and then notified defendant he had rescinded the contract and had quit the possession of said land, and tendered defendant possession thereof.

8. That the rental value of the land described in contract during the time the same was in possession of defendant under said contract was twenty-one hundred and twenty-seven dollars.

No objection is made to the competency of the foregoing stipulated facts, but each party reserves the right at any and all times to object to any and all thereof, upon the ground that the same or any thereof are irrilevant or immaterial.

Notwithstanding this stipulation, either party may offer such evidence as they or either of them may see fit, not inconsistent with said stipulation.

Dated Nov. 11th, 1887.

E. K. HANNA AND
ALLEN, THOMPSON & CROWLEY,
Attorneys for Plaintiff.
B. L. & J. L. SHARPSTEIN,
RUFUS MALLERY, AND
BRENTS, ANDERS & CLARK,
Attorneys for Defendant.

Endorsed: Clark *vs.* Ankeny. "Stipulation of facts."

31 (Copy.)

" Ex. C."

Office of G. T. Thompson, attorney-at-law, over Baker & Boyer's bank.

WALLA WALLA, W. T., *Nov.* 16, 1886.

Levi Ankeny, Esq., Walla Walla, W. T.

DEAR SIR: I have performed my part of the contract in the purchase of the land described in your bond to me. I have learned that you have no title to one hundred and sixty acres of it. You have refused to give me anything more than a quitclaim deed to this part of the land. I cannot accept such a deed. It was not what the contract called for. Unless within five days from this date you convey a perfect title to me to the whole of the land described in the bond, by a good and sufficient conveyance, I will at the end of that time abandon this land and surrender the possession to you and look to you for such compensation as the law allows me on account of your violation of the contract.

Resp't, V. P. CLARK.

Endorsed: "Exhibit C."

Bond.

Levi Ankeny to Van Buren Clark.

Know all men by these presents that I, Levi Ankeny, am held and firmly bound unto Van Buren Clark in the penal sum of $10,000.00; for the payment of which sum, well and truly to
32 be made, I bind myself, my heirs and executors, firmly by these presents.

Sealed with my seal and dated this 20th day of October, A. D. 1882.

The conditions of the above obligation are such that whereas the above obligor has sold and agreed to convey to the above obligee the following-described real estate in Walla Walla county, Washington Territory, to wit, the northeast quarter of section 19 and the northwest quarter of section 20, in township eight north, of range thirty-seven east, of the Willamette meridian, subject to a mortgage for $3,000.00, and interest thereon from Sept. 1st, 1882, which said Clark is to pay when and as due on the payment by the obligee to the obligor of 12,000 bushels of wheat according to the terms of a certain wheat note, of even date herewith, made by obligee to obligor: Now, therefor-, if the said obligor shall, upon the payment of said wheat note, convey said premises to the obligee, his heirs or assigns (subject to said mortgage for $3,000.00), then this obligation to be void; otherwise to be and remain in full force; said payment, however, to be a condition precedent, and a failure to make any payment at the time or in the manner specified in said note shall discharge the said obligor from all obligation to convey the said premises, and the obligor may immediately take possession of said premises, and all crops raised on said premises shall be owned and held by the obligor each year until the payment specified in said note for said year has been fully made.

LEVI ANKENY. [SEAL.]

In presence of—
WM. STINE.
B. L. SHARPSTEIN.

33 TERRITORY OF WASHINGTON, } ss:
County of Walla Walla, }

I, B. L. Sharpstein, a notary public in and for the Territory and county aforesaid, do hereby certify that on this 20th day of October,

A. D. one thousand eight hundred and eighty-two, personally appeared before me Levi Ankeny, whose name is subscribed to the foregoing instrument, to me personally known to be the same person described in and who executed the said instrument, and he acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein expressed.

[SEAL.] B. L. SHARPSTEIN,
Notary Public.

Endorsed: Copy bond. Levi Ankeny to Van Buren Clark. Filed April 22nd, 1885, at 2.20 p. m. Recorded at the request of Van Buren Clark. W. C. Painter, auditor. Book 34, pages 315 & 316.

GENTLEMEN OF THE JURY: The plaintiff is entitled to a verdict in this case for six thousand nine hundred and fifteen & $\frac{50}{100}$ dollars, and you will find accordingly.

To this charge of the court the defendant excepted, and his exception was allowed.

34 In the District Court of the Territory of Washington and for the Fourth Judicial District Thereof, Holding Terms at Sprague.

VAN BUREN CLARK, Plaintiff,
vs.
LEVI ANKENY, Defendant.

Now comes the defendant and moves the court to set aside the verdict of the jury in the above-entitled action and for a new trial in said action upon the following grounds and for the following reasons:

1. Because the court erred in admitting any evidence in said action against the objection of defendant; to which ruling defendant then and there excepted, and the exception — allowed by the court.

2. Because the court erred in admitting evidence of the delivery of wheat by plaintiff to defendant; to which ruling defendant then and there excepted, which exception was allowed by the court.

3. Because the court erred in refusing to allow the defendant to prove the rental value of the land during the time the same was occupied by plaintiff under the contract and in overruling the offer of defendant to prove the rental value of said land during said time; to which ruling defendant duly excepted.

4. Because the court erred in refusing to admit any evidence as to the rental value of the real property during the time same was in the possession of plaintiff; to which ruling defendant then
35 and there excepted, and the exception was allowed by the court.

5. Because the court erred in overruling the offer and excluding the evidence offered by defendant to prove that the mortgage mentioned in the bond was not paid by the plaintiff as and when due or at all, and that prior to the payment of the wheat plaintiff had made such default, and that in September, 1887, an action was commenced to foreclose said mortgage, and that after-

wards and prior to the commencement of this action said action resulted in a decree of foreclosure and sale thereunder of all the property mentioned in the bond to one A. R. Burford, and that plaintiff did not, at the time he claims he notified plaintiff that he intended to rescind or at any time, pay or offer to pay either the interest on said debt or the costs of said action or any thereof; to which ruling def't then and there excepted, and the exception was allowed by the court.

6. Because the court erred in refusing to allow the defendant to prove that plaintiff did not, at the time he claims that he offered to rescind the contract, tender to defendant or offer to account to defendant for the rent, issues, or profits of said land contracted to be sold during the time he, plaintiff, occupied the same; to which ruling defendant then and there excepted, and the exception was allowed by the court.

7. Because the court erred in refusing to give the following instruction to the jury at the request of defendant:

1. The plaintiff must recover, if he can recover at all, upon the cause of action stated in his complaint and not upon what is stated in his reply to defendant's answer. The cause of action stated
36 in his complaint is for wheat sold and delivered by him to defendant. The pleadings, proofs, and admissions of the parties show that this wheat was delivered only as payment on a certain contract, as the purchase price of certain real estate. These facts are inconsistent with the allegations of plaintiff's complaint, do not sustain such allegations, and your verdict should be for the defendant;" to which refusal the defendant then and there excepted, and the exception was allowed by the court.

8. Because the court erred in refusing to give the jury the following instruction asked by defendant:

"2. The plaintiff could not rescind the contract mentioned in his reply without placing or offering to place the defendant in the same situation as to the property and his rights that he, defendant, was at the time of the execution of the contract of purchase, unless that had been rendered impossible by the act of defendant;" to which refusal defendant then and there excepted, and the exception was allowed by the court.

9. Because the court erred in refusing to instruct the jury as follows at the request of defendant:

"3. Plaintiff could not rescind the contract without accounting or offering to account for the rents and profits of the land agreed to be sold while he was in possession of the same;" to which ruling defendant then and there excepted, and the exception was allowed by the court.

10. Because the court erred in refusing to instruct the jury as follows at the request of the defendant:

"4. If the plaintiff knew the nature of defendant's title to the land at the time he did any act under the contract, such as
37 delivering wheat as a part payment of the purchase price, he could not thereafter rescind the contract on account of failure

of title (if such there be), and could not for that reason recover the purchase price;" to which ruling def't duly excepted.

11. Because the court erred in refusing to instruct the jury as follows at the request of defendant:

"5. If plaintiff, by himself or his attorneys, informed defendant he would not receive a quitclaim deed or a bargain-and-sale deed, defendant need not tender such a deed, as the law will not require a man to do an idle thing;" to which ruling defendant then and there excepted, which exception was allowed by the court.

12. Because the court erred in refusing to instruct the jury as follows at the request of defendant:

"6. A bargain-and-sale deed is all defendant would be required to tender or deliver if he had title, and would be a sufficient compliance with the terms of the contract on this point;" to which ruling defendant then and there excepted, and such exception was allowed by the court.

13. The court erred in refusing to instruct the jury at request of defendant—

"That a quitclaim deed would be a sufficient compliance with said contract if defendant had a title to the land in fee simple;" to which ruling defendant then and there duly excepted, and the exception was allowed by the court.

14. Because the court erred in refusing to give the following instruction at defendant's request:

"7. There is no evidence that defendant had not a good
38 title to the land contracted to be sold;" to which defendant
then and there excepted, and the exception was allowed by the court.

15. The court erred in refusing to instruct the jury as follows at defendant's request:

"8. The act of Congress of July 2d, 1864, entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route;' the filing of the map of definite location under said act; the building and completion of said road under said act to Wallula; the examination of the same by the commissioners, and exceptance of the same by the President of the United States gave to the Northern Pacific Railroad Company a fee-simple title to all land included in limits of said grant to Wallula, to which point said road was completed;" to which ruling defendant excepted, and such exception was allowed.

16. Because the court erred in refusing to give at the request of defendant the following instruction:

"9. You are instructed that the land in question, viz., N. E. ¼ sec. 19, township 8 north, of range 37 east, is within the limits of the Northern Pacific land grant as earned by the completion of the road to Wallula;" to which ruling defendant excepted, and the exception was allowed by the court.

17. Because the court erred in refusing to instruct the jury at request of defendant as follows:

"10. If the Northern Pacific Railroad Company had title to the

39 land described in the deed to defendant, such deed gave the title to defendant;" to which ruling defendant then and there excepted, and such exception was allowed by the court.

18. Because the court erred in refusing to give the following instruction at the request of defendant:

"13. If plaintiff, by himself or by his attorneys, notified defendant that he would not accept any deed except a general warranty deed, with full covenants, it would have been idle for defendant to have tendered any other deed; and if any other deed would have satisfied the condition of the bond, defendant would have been by this declaration of plaintiff excused from tendering the same;" to which ruling defendant duly excepted, which exception was allowed by the court.

18. Because the court erred in ruling that the bond required the defendant to give a general warranty deed with full covenants; to which ruling defendant duly excepted, and said exception was allowed by the court.

19. Because the court erred in instructing the jury as follows:

"Gentlemen of the jury, plaintiff is entitled to a verdict in this case for $6,915.50, and you will find accordingly."

To the giving of which instruction dofendant duly excepted, and the exception — allowed by the court.

Because said verdict is against the law and evidence.

B. L. & J. L. SHARPSTEIN &
BRENTS, ANDERS & CLARK,
Attorneys for Defendant.

Due service, in writing, of notice of the foregoing motion and of the copy of said motion is admitted this 12th day of November, 1887.

E. K. HANNA AND
ALLEN, THOMPSON & CROWLY,
Attorneys for Plaintiff.

40 Endorsed: Clark *vs.* Ankeny. Motion for new trial. Filed Nov. 12, 1887. D. A. Clement, clerk.

In the District Court of the Territory of Washington and for the First Judicial District Thereof, Holding Terms at Sprague.

V. B. CLARK, Plaintiff,
vs.
LEVY ANKENY, Defendant.
} Statement of Facts.

The above-entitled action came on for hearing in the above-entitled court on the 11th day of November, 1887. The plaintiff appeared by his attorneys, Allen, Crowley & Thompson and E. K. Hanna, and the defendant by his attorneys, B. L. & J. L. Sharpstein and T. H. Brents, and the hearing of said action proceeded as follows: A jury was duly impaneled and sworn to try said action. The parties, plaintiff and defendant, entered into a stipulation of facts, subject to objection, as therein stated; which stipulation is hereto attached, marked "stipulation of facts," and made a part hereof.

Plaintiff offered in evidence subdivisions "5" and "7" of said stipulation, and the defendant, by his attorneys, objected to said subdivision- of said stipulation or either of them being read 41 in evidence, and objected to any evidence being received to prove the allegations of plaintiff's reply, upon the ground that the same and all such evidence was immaterial and irrelevant and did not prove or tend to prove the allegations of plaintiff's complaint, and that said reply did not state facts sufficient to constitute a defence to the matter stated in defendant's answer, and because said reply is inconsistent with plaintiff's complaint; which said objection was overruled by the court; to which ruling defendant, by his attorneys, duly excepted, and said exception was allowed by the court. Defendant then objected to the admission of any evidence of the delivery of said wheat by plaintiff to defendant; which objection was overruled by the court; to which ruling defendant then and there, by his said attorneys, duly excepted; which exception was allowed by the court. Plaintiff offered to read in evidence said division No. 5 of said stipulation, and defendant then objected to subdivision No. 5 being read in evidence; which objection was overruled, and defendant then and there excepted to said ruling; which exception was allowed by the court. Plaintiff then offered to read in evidence a duly certified copy of a bond; a copy of which bond is hereto attached, marked "bond," and made a part hereof. Defendant objected to said bond being received or read in evidence upon the ground that the same was immaterial and irrelevant; which objection was overruled by the court; to which ruling defendant duly excepted, and said exception was allowed by the court.

V. B. Clark, a witness produced by the plaintiff, testified substantially as follows:

My name is Van Buren Clark. I am the plaintiff. I 42 know the defendant, Levi Ankeny. I entered into a contract with him for the purchase of land—the same land mentioned in the bond in this case, which the witness identified and referred to. After I had delivered all the wheat called for by the bond I went to Mr. Ankeny's bank and told him that, having complied with the contract on my part, I wished him to deliver me a deed for the land, as agreed upon. He said, "All right;" to come in the following Saturday and I should have it. I went to his bank at that time and saw him, but the deed was not given me. I called the third time upon Mr. Ankeny at the bank—this was some time later—and told him I had fullfilled the contract upon my part and wanted him to make me out the deed, or, if he did not do that, to pay me for my wheat. He said to me, "Clark, you have bothered me enough about this matter; I don't want to be bothered by you any more about it." I then turned and left the bank. Some time after this I again went to the bank in company with Milton Aldrich, and Ankeny told me that I was owing notes to the bank, of which he was president, and when I paid up those notes he would make me a

deed to the land. I told him I could not pay the notes until I had a title to the land, so that I might be able to borrow money upon it; that the notes were al- right, and when I could thus raise money I would pay them. He told me to see his attorneys, Mess. B. L. & J. L. Sharpstein. I met Mr. B. L. Sharpstein, who said I could have the deed when I paid my notes at the bank. He afterwards told me I could have a deed—that is, a warranty deed—to the land in section 20 and a quitclaim deed to the land in — 19, and if I was called upon to use my land right under the land laws of the
43 United States to get the title to the land in — 19 I could have pay for what I should pay out in this way; but no arrangement of this kind was ever agreed upon. I recollect being in Sharpstein's office on other business after this and before the action was commenced, but do not think a deed was offered me there at all. I am quite sure that it was not, but if it had been offered me I should have recollected it. I never got a deed of any kind; I never saw any deed. A few days after November 16, 1886, the date on which I gave Mr. Ankeny the written notice which was mentioned in the stipulation, a copy of which is in evidence, marked "Ex. C," I went to the bank, taking Mr. Stanfield, a neighbor, along as a witness with me, and told Mr. Ankeny that I surrendered the land in the bond described back to him and quit the possession of it. He said, "All right." This was about all the talk. Ankeny turned to some other matter, and we went out of the bank. At the time I entered into the bond for the purchase of the land I did not know that any part of it was railroad land. I was a stranger in the country at the time and knew nothing about railroad land, and did not learn until about two months afterwards that any portion of it was.

WILLIAM STANFIELD, being sworn as a witness of plaintiff, testified substantially as follows:

My name is William Stanfield. I am a farmer. I live in Walla Walla county and know the parties to this action. I went along with the plaintiff when he went to the bank of Ankeny, in November, 1886, and heard the conversation between plaintiff and defendant. Mr. Clark asked me to go along as a witness. Plaintiff
44 said to Ankeny he surrendered the possession of the land back to him and that he went out of the possession of it. Ankeny said, "All right," and that is about all that was said between them.

MILTON ALDRICH, being sworn as a witness for plaintiff, testified substantially as follows:

I have known the parties to this action for some time. I was in Ankeny's bank prior to November 16, 1886, and heard something of a conversation between plaintiff and defendant. Plaintiff asked defendant to give him a deed for the land. Defendant asked plaintiff about paying some notes he owed to the bank, and plaintiff said he would settle them when he got his deed to the land. Defendant told plaintiff to go to Mess. Sharpsteins, his attorneys, about the deeds. This is about so much of the conversation as I heard.

Plaintiff rested.

Thereupon defendant moved the court for a judgment of nonsuit, which motion was overruled and denied by the court; to which ruling of the court defendant duly excepted, and the exception was allowed by the court. Defendant then read all of said stipulation of facts except subdivisions 5, 7, and 8. Defendant offered to read in evidence subdivision No. 8 of the aforesaid stipulation of facts; to the reading of which plaintiff objected; which objection was sustained by the court; to which ruling defendant duly excepted and said exception was allowed by the court. Defendant offered to prove the rental value and the value and use of the occupation of said land in said bond described during the time the same was occupied by plaintiff under said contract; to all of which offered evidence the
plaintiff objected, and the said objection was sustained by the
45 court; to which ruling the defendant excepted and said ex-
ception was allowed by the court. Defendant offered to prove that the mortgage for three thousand dollars, mentioned in the bond, had not been paid by plaintiff, and that plaintiff had not paid the same or any part thereof; that the said mortgage had been duly foreclosed and the property duly sold in said foreclosure action subsequent to November 16, 1886, to which action the parties to this action were defendants; to all of which evidence the plaintiff objected, and the said objection was sustained by the court; to which ruling defendant duly excepted, and the said exception was allowed by the court.

Defendant called as a witness Levi Ankeny, who, being duly sworn, testified as follows:

I am defendant in this action. I signed the instrument referred to as the bond herein with the plaintiff. I have been at all times willing and ready to give plaintiff a deed, but not a warranty deed. My wife and myself executed a deed and left it with my attorneys, Mess. B. L. & J. L. Sharpstein, and I told plaintiff this deed was there. This deed was not a warranty deed. I never at any time told plaintiff he could not have a deed to the land without paying his indebtedness to the bank or made the payment of this indebtedness a condition of his receiving a deed. When plaintiff came and notified me that he tendered me the possession of the land I may have said "Is that all?" or something of that kind.

On cross-examination, in answer to the inquiry whether the conversation had not taken place between himself and Clark, as testified to by the other witnesses, he said he supposed they had, or substan-
tially so. I did not at any time intend to consent to a rever-
46 sion of the contract or to use language intending any such
thing.

J. L. **Sharpstein**, a witness produced by the defendant, being first duly sworn, testified in substance as follows:

I am one of the attorneys of the defendant. I know the parties to this action. After Clark claimed he was entitled to a deed and before the notice marked "Ex. C" was received, I had prepared a deed from defendant and wife to the plaintiff for the land mentioned in the bond herein. This deed was executed and acknowledged and left with our firm as attorneys for defendant, to be delivered to plaintiff when he called for it. The plaintiff came into our office about this time on other business, and I informed him that a deed was in the office for him. I think the deed was on the office table at that time. He inquired if it was a warranty deed, and I told him it was not, and he replied that he did not want it. This was the substance of our conversation. I think I never had but two conversations with plaintiff on this subject before this action was commenced, and did not know what became of the deed after plaintiff refused to receive it. I did not take any particular notice of it after that, and have not looked for it since this action was commenced, but think it may be in the office yet.

B. L. **Sharpstein**, being duly sworn, testified in substance as follows:

That he was one of the attorneys for defendant; that as such he met plaintiff and W. G. Langford in the office of Langford & Hanna, in Walla Walla city, in the summer or fall of 1886, and had a conversation in relation to the land described in the bond from
47 defendant to plaintiff. Langford wished to know what kind of a deed the defendant was willing to make under the *the* bond. I offered, for Ankeny, to give plaintiff a warranty deed for the land in section 20, and a quitclaim deed or a warranty deed, expressing a small consideration, for the land in section 19, or the railroad land, as we called it, and if the railroad title failed Ankeny would pay all expenses in procuring title from the Government, if Clark should take the land under the homestead or pre-emption law. I was authorized by Ankeny to make the offer. Plaintiff said he would be willing to do that if Ankeny would pay for his rights as a homesteader or pre-emptor, if he had to use one of them to perfect title. I asked him what price he would place on his right. He said he could not tell. Nothing further was ever done about this proposition. Afterwards plaintiff informed me he would not accept such a deed as I mentioned. I never told plaintiff he could not have a deed without paying his notes in the bank.

Plaintiff, being recalled, testified that he was in Sharpstein's office in regard to a matter not connected with this case, and did not recollect the conversation testified to by John L. Sharpstein in regard to having a deed, and thinks he would recollect it if it had occurred; that he saw no deed on that occasion, nor was any deed shown him or pointed out to him or offered to him on that occasion, according to his best recollection.

E. K. **Hanna**, being called as a witness in rebuttal for plaintiff, ꞏestified in substance—

That he was one of the attorneys for plaintiff, and had been the
law partner of W. G. Langford, and the firm had been
8 plaintiff's attorneys in this action; that he had heard con-
versations in the office between B. L. Sharpstein and his law
artner, Judge Langford, in relation to this matter, but did not ecollect of either plaintiff or Judge Langford for him saying that laintiff would not accept any other than a warranty deed. I was ı the office at a number of conversations between Judge Langford nd B. L. Sharpstein, we acting for plaintiff and he for defendant. could not say that I was present at all of the conversations, but in one of them where the deed was spoken of did I hear plaintiff or ny one for him say that he would not accept any other than a warꞏanty deed.

Defendant asked the court to give to the jury the instructions ereto attached, marked "instructions asked by defendant," which re made a part hereof, and give the jury each of said instructions. 'he court refused to charge the jury as requested by defendant or ive to the jury any of said instructions asked by defendant, and efendant excepted to said ruling, which exception was allowed by he court.

Defendant excepted to the ruling of the court refusing to give to ıe jury instruction No. 1 asked by defendant, which ruling was uly excepted to by defendant.

Defendant excepted to the ruling of the court refusing to give to ıe jury instruction No. 2 asked by defendant, which ruling was
duly excepted to by defendant.
9 Defendant excepted to the ruling of the court refusing to
give to the jury instruction No. 3 asked by defendant, which
uling was duly excepted to by defendant.

Defendant excepted to the ruling of the court refusing to give to ıe jury instruction No. 4 asked by defendant, which ruling was uly excepted to by defendant.

Defendant excepted to the ruling of the court refusing to give to ıe jury instruction No. 5 asked by defendant, which ruling was uly excepted to by defendant.

Defendant excepted to the ruling of the court refusing to give to ıe jury instruction No. 6 asked by defendant, which ruling was uly excepted to by defendant.

Defendant excepted to the ruling of the court refusing to give to ıe jury instruction No. 7 asked by defendant, which ruling was uly excepted to by defendant.

Defendant excepted to the ruling of the court refusing to give to ıe jury instruction No. 8 asked by defendant, which ruling was uly excepted to by defendant.

Defendant excepted to the ruling of the court refusing to give to ıe jury instruction No. 9 asked by defendant, which ruling was uly excepted to by defendant.

Defendant excepted to the ruling of the court refusing to give to the jury instruction No. 10 asked by defendant, which ruling was duly excepted to by defendant.

Defendant excepted to the ruling of the court refusing to give to the jury instruction No. 11 asked by defendant, which ruling was duly excepted to by defendant.

Defendant excepted to the ruling of the court refusing to give to the jury instruction No. 12 asked by defendant, which ruling was duly excepted to by defendant.

50 Defendant excepted to the ruling of the court refusing to give to the jury instruction No. 13 asked by defendant; which ruling was duly excepted to by defendant.

Thereupon the court instructed the jury as follows:

"GENTLEMEN OF THE JURY: Plaintiff is entitled to a verdict in this case for six thousand nine hundred and fifteen and $\frac{50}{100}$ dollars, and you will find accordingly."

To the giving of which instruction defendant then and there excepted, and said exception was allowed by the court.

That said jury thereupon, while in their box and without retiring to deliberate upon the verdict, returned a verdict, in accordance with said instruction, for the sum of six thousand nine hundred and fifteen and $\frac{50}{100}$ dollars; and thereupon defendant, by his said attorneys, gave due notice of a motion to set aside said verdict and for a new trial, and on said day, to wit, November 12th, 1887, said defendant filed said motion and served the same on plaintiff's attorneys, and the hearing of said motion was adjourned until the 16th day of March, 1888; on which day said motion came on for a hearing and was, after argument by the attorneys for the respective parties, plaintiff and defendant, overruled and denied by the court; to which ruling defendant then and there duly excepted, and said exception was allowed by the court.

That at the times the said several rulings hereinbefore mentioned were made the defendant moved the court to have the same entered on the journal of said court; which said several motions were overruled; to which rulings defendant then and there duly excepted, and said several exceptions were allowed by the court.

51 *Agreement.*

It is hereby stipulated and agreed by and between the parties to the above action that the foregoing, from page 1 to page 13, inclusive, is a true and correct statement of the facts and all thereof in the above action, and that the judge of the above-entitled court may sign and certify the same as such. All notice of the application to settle the same is hereby waived.

E. K. HANNA AND
ALLEN & CROWLEY,
Attorneys for Plaintiff.
B. L. & J. L. SHARPSTEIN,
Att'ys for Defendant.

s

s

Certificate.

I, George Turner, associate justice of the supreme court of Washington Territory and judge of the above-entitled court, do hereby certify that the above statement of facts, from page 1 to page 13, inclusive, contains all of the facts in the above-entitled action.

Dated and done at Spokane Falls this 16th day of March, 1888.

GEORGE TURNER,
Judge of the Above-Entitled Court.

Endorsed: In the district court, holding terms at Sprague. Van Buren Clark, pl'ff, *vs.* Levi Ankeny, def't. Statement. Filed March 16, 1888. D. A. Clement, clerk, by Chas. B. Johnson, deputy. Filed Nov. 24th, 1888. Francis Henry, clerk sup. court, W. T.

(Here follow maps marked pp. 52 & 53.)

54 EXHIBIT B.

U. S. LAND OFFICE, WALLA WALLA, W. T., *ss:*

We, R. Guichard, register, and James Braden, receiver, respectively, of the U. S. land office, Walla Walla, Washington Territory, do hereby certify that the attached tracing and letter are true and correct copies of the original map and letter respectively of August 16th, 1881, on file in this office.

Given under our hands this 9th day of November, 1887.

R. GUICHARD, *Register.*
JAMES BRADEN, *Receiver.*

(Copy.)

"F."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Aug.* 16, 1881.

Register and receiver, Walla Walla, Washington Territory.

GENTLEMEN: Referring to office letter "F," of Nov. 17, 1880, transmitting diagram showing withdrawal of lands on definite location of the Northern Pacific railroad from a point near Walla Walla, Washington Territory, to a point near Spokane Falls, in said Territory, I transmit herewith a diagram on which is marked a yellow line for the 40-mile limits and a pink line for the additional 10 miles or "indemnity" limits, beyond which line said railroad company will not be entitled to select lands on construction of
55 its roads to the point to which it is definitely located, as shown by said diagram.

The withdrawal heretofore ordered will not be affected in any manner by this action, the intention being merely to call your attention to the fact that the company will not be entitled to select land beyond the designated line.

Respectfully, N. C. McFARLAND,
Commissioner.

56 In the Supreme Court of the Territory of Washington, January Term, A. D. 1889.

Levi Ankeny, Plaintiff in Error,
vs.
Van Buren Clark, Defendant in Error.
Opinion by Chief Justice Burke.

It appears from the records in this case that on October 20th, 1882, at Walla Walla, in Washington Territory, Levi Ankeny, the plaintiff in error, entered into a contract with Van Buren Clark, the defendant in error, by which Ankeny agreed to sell and convey to Clark two quarter sections of land in Walla Walla county in consideration of 12,000 bushels of wheat, to be delivered in three annual instalments of 4,000 bushels each, and of the assumption by Clark of a mortgage of $3,000 then on the land. This contract was evidenced by three written instruments, as follows:

1. A bond from Ankeny to Clark in the penal sum of $10,000, conditioned to convey the land to Clark upon his paying the consideration according to agreement.
2. A "wheat note" from Clark to Ankeny, which reads as follows:

"Walla Walla, W. T., *Oct.* 20, 1882.

"For value received I promise to pay to Levi Ankeny or order twelve thousand (12,000) bushels of good, merchantable wheat, said wheat to be delivered to the owner of this note at any railroad station in Walla Walla county, Washington Ty., and payments to be made as follows: On or before Oct. 15th, 1883, four 57 thousand (4,000) bushels; on or before Oct. 15th, 1884, four thousand (4,000) bushels, and on or before Oct. 15th, 1885, four thousand (4,000) bushels, the owner of this note to furnish sacks for said wheat."

3. A chattel mortgage from Clark to Ankeny to secure the payment of the wheat note.

Under this agreement Clark entered into possession of the land and continued in possession of it until the fall of 1886.

In performance of this contract Clark, in December, 1883, delivered to Ankeny 4,167 bushels of wheat, and in September, 1885, he delivered 8,600 bushels, making 767 bushels more than the contract called for. Ankeny accepted this wheat in fulfilment of the contract.

After the delivery of the wheat to Ankeny, Clark demanded a deed for the land. This Ankeny neglected to give, putting Clark off from time to time upon one pretext or another, until Clark, becoming impatient, finally insisted either upon a deed to the land or payment for his wheat. Clark was then referred by Ankeny to the latter's attorneys, who informed him that he could have a warranty deed to the quarter on the even section and a quitclaim deed to the quarter on the odd section, or the railroad land, as it was called, and they further informed him that if the Northern Pacific Railroad Company should not get title to the odd section and he should be obliged to procure title from the Governmeent Ankeny would pay the necessary expenses of obtaining title in that way. This does not seem to have satisfied Clark, and on November 16th, 1886, he served upon Ankeny the following notice:

WALLA WALLA, W. T., *Nov.* 16, 1886.

Levi Ankeny, Esq., Walla Walla, W. T.

58 DEAR SIR: I have performed my part of the contract in the purchase of the land described in your bond to me. I have learned that you have no title to one hundred and sixty acres of it. You have refused to give me anything more than a quitclaim deed to this part of the land. I cannot accept such a deed. It was not what the contract called for. Unless within five days from this date you convey a perfect title to me to the whole of the land described in the bond by a good and sufficient conveyance I will, at the end of that time, abandon this land and surrender the possession to you and look to you for such compensation as the law allows me on account of violation of the contract.

Resp'y, V. B. CLARK.

Ankeny seems to have paid no attention to this notice, and Clark, several days thereafter, taking a witness with him, went to Ankeny's bank and formally surrendered possession of the land to Ankeny. Clark then abandoned possession of the land and has not occupied it since.

Subsequent to all this, and on the 19th day of March, 1887, Clark brought this action in the district court of the first district to recover from Ankeny the value of 12,767 bushels of wheat delivered under the contract. The case was tried before a jury, who, upon the direction of the court, brought in a verdict for the plaintiff, and judgment was given upon the verdict. The defendant brought the case to this court under the act of 1883.

Plaintiff in error insists that the court erred in overruling his objection to the admission of the testimony offered by defendant in error, to support his action, upon the trial; that under the complaint in the action the evidence was wholly inadmiss*a*ble; that defendant in error had misconceived his remedy, if he had one, and that in view of which, the conceded facts in the case, he cannot possibly recover under his pleadings.

59 In view of the earnestness and confidence with which this view of the case has been pressed upon us by counsel for plaintiff in error, we shall proceed to notice the pleadings at greater length than we otherwise should have done.

The complaint in this case simply alleges the sale and delivery to the defendant of 12,767⅓ bushels of wheat; that the same was and is reasonably worth the sum of fifty cents a bushel, or, in all, $6,383.41⅔, lawful money of the United States, and that defendant has not paid the same or any part thereof, and prays judgment for this amount, with interest from October 10th, 1885.

The defendant answers this complaint, denying each and every allegation thereof, and "for a further and separate answer and defense defendant alleges the execution of the wheat note" and the chattel mortgage to secure it, setting out both *in extenso*, and concludes by alleging that "all the wheat delivered to defendant by plaintiff was delivered and received as payment on said note, and not otherwise."

He makes no mention of the bond or of any contract for the sale of land.

The plaintiff in reply makes a full statement of the contract for the sale of the land, setting forth the bond *in hæc verba*, and alleging performance on his part and default on the part of defendant. The concluding paragraph of plaintiff's reply — as follows:

> "That after the said plaintiff had so performed said contract in the delivery of said wheat to defendant he duly demanded of defendant that defendant convey said real estate to plaintiff, as by his said bond he had undertaken to do.
>
> That said defendant then and there neglected and refused so to do, and has ever since and still does neglect and refuse to grant and convey said premises to plaintiff by any good and sufficient deed, and that said defendant has no title to the northeast quarter
> 60 of section 19, in township 8 north, of range 37 east, of said
> real estate, and since the making of this said contract was not the owner or seized in fee or at all of said land. Plaintiff alleges that the wheat mentioned and described in his complaint, except the excess thereof over the requirements of said bond, is the purchase price of said land advanced and paid by plaintiff to defendant, and that by reason of his said neglect and refusal and inability to perform the said contract the said defendant became and is indebted to plaintiff for the reasonable value of said wheat, and that such demand constitute- the cause of action in the complaint pleaded. Whereof plaintiff asks judgment as in the complaint."

We feel no hesitation in holding that the theory upon which plaintiff brought this action was the correct one. Under the old system of pleadings, an action in assumpsit would lie to recover back purchase-money paid upon a contract of sale which had been rescinded.

2 Hilliard on Vendors, 61, 62.
Elliot *v.* Edwards, 3 B. & P., 181.
Eames *v.* Savage, 14 Mass., 425.
Newsome *v.* Graham, 10 B. & C., 234.

The same rule of pleading prevails in like cases under the code, and there is no good reason why it should not. When a contract is rescinded it is abrogated and annulled, it is as if it had never existed, and the party seeking to recover back money paid under it proceeds, not upon the contract, for there is none, but upon the implied obligation that exists on the part of the one who received money under it to pay it back to the one from whom he received it.

Farron *v.* Sherwood, 17 N. Y., 227.
McManus *v.* Opher Silver Mining Co., 4 Nev., 15.
Wilkins *v.* Stege, 22 Cal., 231.
Ah Kou *et al. vs.* Seattle, etc., R. R. Co., 2 Wash. Ty., 40.

61 The reply in this case is neither inconsistent with nor a departure from the complaint. It is a proper replication to the new matter set up in the answer. It is, however, defective in not pleading a rescission of the contract. This omission, which was an evident oversight, did not mislead or prejudice the appellant or affect his substantial right, and under the liberal provisions of our code was such as may be cured by amendment at any stage of the proceedings.

The next error assigned by plaintiff in error is that defendant in error neither alleged nor proved a rescission of the contract or facts entitling him to a rescission. The record in this case clearly shows a performance of the contract by the *defendant* in error and a failure to perform by defendant in error.

This was not seriously disputed upon the argument. But it is insisted that by this failure to elect seasonably to disaffirm the contract the defendant in error had waived his right so to do; that before defendant in error gave his written notice of his intention to disaffirm, plaintiff in error had tendered performance of the contract by offering a quitclaim deed of the land, which defendant in error refused, and finally, before defendant in error's attempted rescission, he did not, as he was bound to do, put plaintiff in error in as good condition as he was before the sale; he did not offer to release or cancel the bond or to pay rent for the use of the land.

The whole controversy between the parties in this case seems to have arisen out of a suspicion, which both parties evidently entertained, of the soundness of the title to the quarter section known as the "railroad land." Fearing this title, the defendant in error was averse to receiving a quitclaim deed and seemed to think that under his contract he was entitled to a warranty deed.

In this construction of his contract he was mistaken. By the terms of *of* the bond the vendor was bound, it is true, to convey to the vendee a good title to the land, but he was at 62 liberty to convey it by any form of deed effectual for that purpose, and under the statutes of our Territory a quitclaim deed is just as effectual to convey the title to real estate as any other form of deed, and a grantee in a quitclaim deed is entitled to the same presumption as to *bona fides* and has the same rights as a grantee in a deed of general warranty. This is undoubtedly true of a quitclaim deed which purports on its face to convey not merely an interest, but the real estate itself.

Laws of 1871, p. 195.
Code of Washington, secs. 2311, 2314, 2323, 2726, 2737.
Laws of 1885–'6, p. 177.

By the statute of 1885–'6 above referred to it is provided that a quitclaim deed purporting to convey the interest of the grantor shall not be held to operate as a conveyance of an after-acquired title unless words are added expressing such intention.

The operative words of such deed would in any event probably preclude the idea of its conveying an after-acquired title; but it is believed that under the statutes of this Territory relating to deeds and to their registration a deed in the form of a quitclaim which purports on its face to convey the real estate would operate to convey even an after-acquired title.

Such an instrument would be in effect a bargain-and-sale deed.

Laws of 1871, p. 195.
Code of Washington, 2311, 2314.

The decisions of the Supreme Court of the United States to which out attention has been called are not applicable here, because, as we have seen, this subject is governed in this Territory by positive statutory regulation.

63 But no form of deed is sufficient to convey a title where the grantor has none, and this, we think, is the situation of the plaintiff in error with respect to the quarter section known as the railroad land. The evidence introduced by plaintiff in error proves that the United States had the legal title to this section; that it was included within the grant of land to the Northern Pacific Railroad Company; that the railroad company conveyed it to one Huff, and Huff to plaintiff in error; but the proof leaves the legal title still in the Government. Granting everything that is claimed for the title, the utmost the Northern Pacific Railroad Company ever had was an equitable interest, for it is well settled that the legal title does not pass to the company until the issuance of the patent, and, so far as the record shows, no patent has issued for this land.

Railway Co. *v.* Prescott, 16 Wal., 60.
Railway Co. *v.* McShane, 22 Wal., 462.
Northern Pacific R. R. Co. *v.* Trail Co., 115 U. S., 606.

By the terms of the bond in this case plaintiff in error agreed to sell and convey this land to defendant in error.

This he could not do, because he had at best but an equitable title, and defendant in error was entitled to a good legal title. "The legal effect of a contract to sell," says the United States Supreme Court in 1 Black, 450, "is that the land shall be conveyed by a deed from one who has a good title or full power to convey a good title."

Washington & Turner *v.* Ogden, 1 Black, 450.
Bank of Columbia *v.* Hagner, 1 Peters, 455.
Turner *v.* McDonald, 18 Pacific Rep., 262.

But it is contended that in any event, upon a rescission of the contract by defendant in error, plaintiff in error was entitled to have a release or cancellation of the bond which he had given for the land.

64 In this contention plaintiff in error is right. A bond like the one in this case is, under sec. 2311 of the code, an incum-

brance upon real estate, and if plaintiff in error is to be put in as good condition as he was before the sale, the bond must be cancelled. We think, however, that an affirmance of the judgment of the district court would operate to extinguish whatever right or title under the bond remained in defendant in error and in effect cancel the bond.

Pence *v.* Langdon, 99 U. S., 578.
American Wine Co. *v.* Brasher Bros., 13 Federal Reporter, 595.

Besides, under sec. 475 of the Code of Washington, the court has power to reverse, affirm, or modify the judgment of the court below, and to prevent the possibility of harm to the plaintiff in error from this bond the court will order the judgment below modified so as to require defendant in error, before an execution shall issue upon the judgment, to make and execute a proper and sufficient release or cancellation of the bond and deposit the same with the clerk of the court — the use of plaintiff in error. It should be observed here that the record nowhere shows that plaintiff in error ever made any complaint of the failure to release or cancel this bond before coming to this court, and there can be no doubt upon the evidence that the failure to cancel it was unintentional on the part of the defendant in error. The only remaining question relates to the claim of plaintiff in error for rents during the time that defendant in error had possession of the land under the contract of purchase. The authorities do not seem to be agreed upon the question as to the right of the vendor to rents upon a rescission of the contract of sale, but we think the more just and reasonable rule is to offset the claim
65 for rent against the claim for interest.

Tolbret *v.* Sebree, 1 Dana, 56.
Shields *v.* Bogliolo, 7 Mo., 134.
Patrick *v.* Roach, 21 Texas, 251.
White *v.* Tucker, 52 Miss., 145.
Cook *v.* Daggett, 2 Allen, 441.
Bardsley's appeal, 10 At. Rep., 39.

The fairness and justice of this rule are well illustrated in this case. The vendor was the party in fault through*t*out; he received the full purchase price for the land according to the terms of his contract; he failed to perform the contract on his part; he never, to this day, formally tendered a deed to defendant in error, and if defendant in error's statements that he would not accept a quitclaim deed be held to excuse plaintiff in error for not tendering a deed before this action was begun it certainly did not excuse his failure to make a tender of a deed of some kind in his answer or to bring a deed into court upon the trial. Yet he did neither the one nor the other. The defendant in error claims interest only from the time when he delivered up possession of the land to plaintiff in error, and that he is justly entitled to. The cause will be remanded to the court below with instructions to modify the judgment in accordance with this opinion—that is to say, the judgment will be modified only so far as to suspend the issuance of execution until the defendant in error shall execute a proper and sufficient release or cancellation of the bond mentioned in this case and deposit such release or cancellation with the clerk of the district court for the use of the plaintiff in error.

THOMAS BURKE,
Chief Justice.

We concur.
FRANK ALLEN,
Associate Justice.
66 L. B. NASH,
Asso. Justice.

67 In the Supreme Court of Washington Territory, January Term, 1889.

LEVI ANKENY, Plaintiff in Error,
vs.
VAN BUREN CLARK, Defendant in Error.

To the honorable justice of the supreme court of Washington Territory:

Now comes Levi Ankeny, of Walla Walla county, Washington Territory, by B. L. & J. L. Sharpstein, his attorneys, and complains that in the records and proceedings and also in the rendition of judgment in an action between Levi Ankeny, plaintiff in error, and said Van Buren Clark, defendant in error, tried in the supreme court of Washington Territory, at the January term thereof, A. D. eighteen hundred and eighty-nine, being the highest court of law or equity of said Territory in which a decision could be had in said action, in which judgment was rendered against him on the 31st day of January, A. D. eighteen hundred and eighty-nine, manifest error hath intervened, to the great damage of the said Levi Ankeny, plaintiff in error; wherefore he, the said Levi Ankeny, plaintiff in error, prays for the allowance of a writ of error and such other process as may cause the same to be cerrected by the Supreme Court of the United States aforesaid.

B. L. & J. L. SHARPSTEIN,
Attorneys for Plaintiff in Error.

Allowed this 5th day of March, A. D. 1889, and it is ordered by the court that a writ of error returnable to the Supreme Court of the United States issue from this court, and that a citation to the defendant in error be duly issued from this court, and that a
68 transcript of the records, proceedings, and evidence, duly authenticated, be made and sent to the Supreme Court of the United States.

THOMAS BURKE,
Chief Justice of the Supreme Court of Washington Territory.

(Endorsed:) Filed March 4th, 1889. Francis Henry, clerk.

69 In the Supreme Court of Washington Territory.

LEVI ANKENY, Plaintiff in Error,
vs.
VAN BUREN CLARK, Defendant in Error.
} Prayer for Reversal of Judgment.

The plaintiff in error prays for a reversal of the judgment rendered in the above-entitled action by the supreme court of Washington Territory.

B. L. & J. L. SHARPSTEIN,
Attorneys for Plaintiff in Error.

(Endorsed:) Filed March 4, 1889. Francis Henry, clerk.

70 In the Supreme Court of Washington Territory, January Term, 1889.

LEVI ANKENY, Plaintiff in Error,
vs.
VAN BUREN CLARK, Defendant in Error.

UNITED STATES OF AMERICA.

TERRITORY OF WASHINGTON,
County of Thurston, } *ss:*

I, B. L. Sharpstein, being first duly sworn, depose and say that I am one of the attorneys for the plaintiff in error in the above-entitled action and was such attorney of record on the trial of this action in the supreme court of Washington Territory and the court below; that the said plaintiff in error is not in this county; that I am fully acquainted with all of the facts and the amount involved in this action, and that the amount involved and which defendant in error claimed and recovered in this court and in the court below exceeds five thousand ($5,000.00) dollars over and above all legal counter-claims, set-offs, interest, and costs, and the amount in controversy in said action between the plaintiff in error and the defendant in error does now and did at the time of commencement of the action exceed the sum of five thousand ($5,000.00) dollars exclusive of interest and costs.

71 B. L. SHARPSTEIN.

Subscribed and sworn to before me this 4th day of March, 1889.
FRANCIS HENRY, *Clerk.*

(Endorsed:) Filed March 4, 1889. Francis Henry, clerk.

72 In the Supreme Court of Washington Territory.

Levi Ankeny, Plaintiff in Error,
vs.
Van Buren Clark, Defendant in Error.

Assignment of Errors by the Plaintiff in Error.

1st. The court erred in holding that the defendant in error could recover under the pleadings in this action.

2nd. The court erred in holding that the defendant in error could treat the contract as rescinded and recover without pleading a rescission or facts entitling him to treat the contract as rescinded.

3rd. The court erred in not allowing the plaintiff in error the value of the use of the premises while held by the defendant in error under the contract.

4th. The court erred in holding that the plaintiff in error had no legal title to the land — that the defendant in error had a right to rescind on that ground.

5th. The court erred in holding that no legal title passed to the Northern Pacific Railroad Company under their grant from the United States to the lands embraced within the grant.

6th. The court erred in holding that the defendant in error need not reconvey the interest in the land conveyed to him by
73 plaintiff in error before bringing his action, but that he could do so after judgment in the supreme court of the Territory.

7th. The court erred in affirming the judgment of the lower court and in rendering judgment against the plaintiff in error under the pleadings and evidence in this action.

B. L. & J. L. SHARPSTEIN,
Attorneys for Plaintiff in Error.

(Endorsed:) Filed March 4th, 1889. Francis Henry, clerk.

74 In the Supreme Court of Washington Territory, January Term, 1889.

Levi Ankeny, Plaintiff in Error,
vs.
Van Buren Clark, Defendant in Error.

Know all men by these presents that we, Levi Ankeny, as principal, and William O'Donnell and William P. Winans, as sureties, are held and firmly bound unto said Van Buren Clark in the sum of twelve thousand (12,000.00) dollars, lawful money of the United States, to be paid to the said Van Buren Clark, his executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 1st day of March, 1889.

Whereas the above-named Levi Ankeny hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered by the supreme court of the Territory of Washington in a certain action wherein said Levi Ankeny was appellant and Van Buren Clark was appellee:

Now, therefore, the condition of this obligation is such that if the above-named Levi Ankeny shall prosecute his writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

75 LEVI ANKENY. [SEAL.]
WILLIAM O'DONNELL. [SEAL.]
WILLIAM P. WINANS. [SEAL.]

Sealed and delivered in presence of—
A. R. BURFORD.
W. H. STULL.

UNITED STATES OF AMERICA,
Territory of Washington, County of Walla Walla, } *ss:*

We, William O'Donnell and William P. Winans, sureties above named, being duly sworn, depose and say and each for himself sayeth that he is worth the sum of $12,000.00 over and above his just debts and liabilities.

WILLIAM O'DONNELL.
WILLIAM P. WINANS.

Subscribed and sworn to before me this 1st day of March, 1889.
A. R. BURFORD,
Notary Public.

I approve the foregoing bond this —th day of March, 1889.
THOMAS BURKE,
Chief Justice of the Supreme Court of Washington Territory.

(Endorsed:) Filed March 5th, 1889. Francis Henry, clerk.

76 In the Supreme Court of the United States of America.

LEVI ANKENY, Plaintiff in Error,
vs.
VAN BUREN CLARK, Defendant in Error.

UNITED STATES OF AMERICA,
Territory of Washington, } *ss:*

To Van Buren Clark, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington, D. C., on the second Monday of October next, pursuant to a writ of error sued out of the supreme court of Washington Territory, wherein Levi Ankeny is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done by the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 5th day of March, in the year of our Lord one thousand eight hundred and eighty-nine.

THOMAS BURKE,
[SEAL.] *Cheif Justice of the Supreme Court of Washington Territory.*

Attest: FRANCIS HENRY, *Clerk.*

(Endorsed:) Filed March 5th, 1889. Francis Henry, clerk.

77 TERRITORY OF WASHINGTON,
County of Walla Walla, } *ss:*

I, Joshua M. McFarland, sheriff of Walla Walla county, Washington Territory, do hereby certify that I served the within citation on the within-named Van Buren Clark, defendant in error, in Walla Walla county, Washington Territory, on the 9th day of March, A. D. 1889, by there and then delivered to said Van Buren Clark, defendant in error, personally a copy of said citation.

JOSHUA M. McFARLAND,
Sheriff of Walla Walla County, Washington Territory.

Sheriff fees:

Serving summons	$1 00
Mileage, 2 miles	20 cts.
Total	1 20

Paid by plaintiff in error.

78 *Journal Entry.*

FRIDAY, *January 18th*, 1889.

LEVI ANKENY, Appellant,
vs.
VAN BUREN CLARK. } # 578.

The argument of counsel in this cause having been continued to the hour of adjournment, court adjourned to to-morrow morning at 10 o'clock.

SATURDAY, *January 19th*, 1889.

LEVI ANKENY, Appellant,
vs.
VAN BUREN CLARK, Appellee. } # 578.

The argument of this cause having been concluded, the same was submitted and taken under advisement by the court.

LEVI ANKENY, Appellant,
vs.
VAN BUREN CLARK, Appellee. } # 578. Judgment.

This cause having been heretofore submitted to the court upon the transcript of the record of the district court of the fourth judicial district of Washington Territory, holding terms at Sprague, and upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises and having filed its opinion in writing, it is now, on this 31st day of January, A. D. 1889, on motion of Allen & Crowley, of counsel for appellee, considered, adjudged, and decreed that the judgment of the said 79 district court be, and the same is hereby, substantially affirmed, with costs, and that the said Van Buren Clark recover of and from the said Levi Ankeny the costs of this action, taxed and allowed at — dollars, and that execution issue therefor; and it is further ordered that this cause be remitted to the said district court for further proceedings, in accordance with the opinion herein filed.

TUESDAY, *March* 5, 1889—10 o'clock a. m.

Court met pursuant to adjournment.

Present as of yesterday, and also present Hon. Thomas Burke, chief justice; Wm. H. White, U. S. attorney.

Journal of yesterday read and approved.

LEVI ANKENY, Appellant,
vs.
VAN BUREN CLARK, App-lee. } # 578.

And now comes Levi Ankeny, appellant, by B. L. & J. L. Sharpstein, his attorneys, and in open court prays for a writ of error to the Supreme Court of the United States, and, the court being fully advised in the premises, it is considered by the court that the said writ of error be, and the same is hereby, granted and allowed.

80 In the Supreme Court of Washington Territory, January Term, 1889.

LEVI ANKENY, Plaintiff in Error,
vs.
VAN BUREN CLARK, Defendant in Error. }

To the honorable justices of the supreme court of Washington Territory:

Now comes Levi Ankeny, of Walla Walla county, Washington Territory, by B. L. & J. L. Sharpstein, his attorneys, and complains that in the records and proceedings and also in the rendition of judgment in an action between Levi Ankeny, plaintiff in error, and said Van Buren Clark, defendant in error, tried in the supreme court of Washington Territory, at the January term thereof, A. D. eighteen hundred and eighty-nine, being the highest court of law

or equity of said Territory in which a decision could be had in said
action, in which judgment was rendered against him on the
81 31st day of January, A. D. eighteen hundred and eighty-
nine, manifest error hath intervened, to the great damage of
the said Levi Ankeny, plaintiff in error.

Wherefore he, the said Levi Ankeny, plaintiff in error, prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States aforesaid.

B. L. & J. L. SHARTSTEIN,
Attorneys for Plaintiff in Error.

Allowed this 5th day of March, A. D. 1889, and it is ordered by the court that a writ of error, returnable to the Supreme Court of the United States, issue from this court, and that a citation to the defendant in error be duly issued from this court, and that a transcript of the records, proceedings, and evidence, duly authenticated, be made and sent to the Supreme Court of the United States.

THOMAS BURKE,
Chief Justice of the Supreme Court of Washington Territory.

82 [Endorsed:] In the supreme court of Washington Territory. Levi Ankeny, plaintiff in error, *vs.* Van Buren Clark, defendant in error. Petition for writ of error. Filed March 4, 1889. Francis Henry, clerk. 578. B. L. & J. L. Sharpstein, att'ys for pl'ff in error.

83 In the Supreme Court of Washington Territory.

LEVI ANKENY, Plaintiff in Error,
vs.
VAN BUREN CLARK, Defendant in Error.
} Prayer for Reversal of Judgment.

The plaintiff in error prays for a reversal of the judgment rendered in the above-entitled action by the supreme court of Washington Territory.

B. L. & J. L. SHARPSTEIN,
Attorneys for Plaintiff in Error.

84 [Endorsed:] In the supreme court. Levi Ankeny, plaintiff in error, *vs.* Van Buren Clark, defendant in error. Prayer for reversal of judgment. Filed March 4, 1889. Francis Henry, clerk.

85 In the Supreme Court of Washington Territory, January Term, 1889.

LEVI ANKENY, Plaintiff in Error,
vs.
VAN BUREN CLARK, Defendant in Error.

UNITED STATES OF AMERICA,
Territory of Washington, County of Thurston, } *ss:*

I, B. L. Sharpstein, being first duly sworn, depose and say that I am one of the attorneys for the plaintiff in error in the above-entitled action and was such attorney of record on the trial of this action in the supreme court of Washington Territory and the court below; that the said plaintiff in error is not in this county; that I am fully acquainted with all of the facts and the amount involved in this action, and that the amount involved and which defendant in error claimed and recovered in this court and in the court 86 below exceeds five thousand ($5,000.00) dollars over and above all legal counter-claims, set-offs, interest, and costs, and the amount in controversy in said action between the plaintiff in error and the defendant in error does now and did at the time of the commencement of the action exceed the sum of five thousand ($5,000.00) dollars, exclusive of interest and costs.

B. L. SHARPSTEIN.

Subscribed and sworn to before me this 4th day of March, 1889.

FRANCIS HENRY, *Clerk.*

[Endorsed:] In supreme court. Levi Ankeny *vs.* Van Buren Clark. Affidavit. Filed March 4, 1889. Francis Henry, clerk.

87 In the Supreme Court of Washington Territory.

LEVI ANKENY, Plaintiff in Error,
vs.
VAN BUREN CLARK, Defendant in Error.

Assignment of Errors by the Plaintiff in Error.

1st. The court erred in holding that the defendant in error could recover under the pleadings in this action.

2nd. The court erred in holding that the defendant in error could treat the contract as rescinded and recover without pleading a rescission or facts entitling him to treat the contract as rescinded.

3rd. The court erred in not allowing the plaintiff in error the value of the use of the premises while held by the defendant in error under the contract.

4th. The court erred in holding that the plaintiff in error 88 had no legal title to the land and that the defendant in error had a right to rescind on that ground.

5th. The court erred in holding that no legal title passed to the Northern Pacific Railroad Company under their grant from the United States to the lands embraced within the grant.

6th. The court erred in holding that the defendant in error need not reconvey the interest in the land conveyed to him by plaintiff in error before bringing his action, but that he could do so after judgment in the supreme court of the Territory.

7th. The court erred in affirming the judgment of the lower court and in rendering judgment against the plaintiff in error under the pleadings and evidence in this action.

B. L. & J. L. SHARPSTEIN,
Attorneys for Plaintiff in Error.

89 [Endorsed:] In the supreme court. Levi Ankeny, plaintiff in error, *vs.* Van Buren Clark, defendant in error. Assignment of errors. Filed March 4, 1889. Francis Henry, clerk.

90 In the Supreme Court of Washington Territory, January Term, 1889.

LEVI ANKENY, Plaintiff in Error,
vs.
VAN BUREN CLARK, Defendant in Error.

Know all men by these presents that we, Levi Ankeny, as principal, and William O'Donnell and William P. Winans, as sureties, are held and firmly bound unto said Van Buren Clark in the sum of twelve thousand ($12,000.00) dollars, lawful money of the United States, to be paid to the said Van Buren Clark, his executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 1st day of March, 1889.

Whereas the above-named Levi Ankeny hath prosecuted a writ of error to the Supreme Court of the United States to reverse
91 the judgment rendered by the supreme court of the Territory of Washington in a certain action wherein said Levi Ankeny was appellant and Van Buren Clark was appellee:

Now, therefore, the condition of this obligation is such that if the above-named Levi Ankeny shall prosecute his writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

LEVI ANKENY. [SEAL.]
WILLIAM O'DONNELL. [SEAL.]
WILLIAM P. WINANS. [SEAL.]

Sealed and delivered in presence of—
A. R. BURFORD.
W. H. STULL.

UNITED STATES OF AMERICA,
Territory of Washington, County of Walla Walla, } *ss:*

We, William O'Donnell and William P. Winans, sureties above named, being duly sworn, depose and say and each for himself sayeth that he is worth the sum of $12,000.00 over and above his just debts and liabilities.

WILLIAM O'DONNELL.
WILLIAM P. WINANS.

92 Subscribed and sworn to before me this 1st day of March, 1889.

[Seal A. R. Burford, Notary Public, Washington Territory.]

A. R. BURFORD,
Notary Public.

I approve the foregoing bond this —th day of March, 1889.

THOMAS BURKE,
Chief Justice of the Supreme Court of Washington Territory.

93 [Endorsed:] In the supreme court of Washington Territory. Levi Ankeny *vs.* Van Buren Clark. Bond. Filed March 5th, 1889. Francis Henry, clerk.

94 In the Supreme Court of the United States of America.

LEVI ANKENY, Plaintiff in Error,
vs.
VAN BUREN CLARK, Defendant in Error.
} Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of Washington Territory, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the Territory of Washington, before you, between Levi Ankeny, plaintiff in error, and Van Buren Clark, defendant in error, a manifest error hath happened, to the great damage of the said Levi Ankeny, plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, 95 do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the fifth day of March, in the year of our Lord one thousand eight hundred and eighty-nine.

[Seal Supreme Court, Washington Territory.]

FRANCIS HENRY,
Clerk of the Supreme Court of Washington Territory.

96 [Endorsed:] In the Supreme Court. Levi Ankeny, plaintiff in error, *vs.* Van Buren Clark, defendant in error. Writ of error. Filed March 5th, 1889. Francis Henry, clerk.

97 In the Supreme Court of the United States of America.

LEVI ANKENY, Plaintiff in Error,
vs.
VAN BUREN CLARK, Defendant in Error.

UNITED STATES OF AMERICA, *Territory of Washington*, } *ss* :

To Van Buren Clark, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington, D. C., on the second Monday of October next, pursuant to a writ of error sued out of the supreme court of Washington Territory, wherein Levi Ankeny is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done by the parties in that behalf.

98 Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 5th day of March, 1889, in the year of our Lord one thousand eight hundred and eighty-nine.

[Seal Supreme Court, Washington Territory.]

THOMAS BURKE,
Chief Justice of the Supreme Court of Washington Territory.

Attest: FRANCIS HENRY, *Clerk.*

99 TERRITORY OF WASHINGTON, *County of Walla Walla*, } *ss* :

I, Joshua M. McFarland, sheriff of Walla Walla county, Washington Territory, do hereby certify that I served the within citation on the within-named Van Buren Clark, defendant in error, in Walla Walla county, Washington Territory, on the 9th day of March, A. D. 1889, by there and then delivered to said Van Buren Clark, defendant in error, personally a copy of said citation.

JOSHUA M. McFARLAND,
Sheriff of Walla Walla County, Washington Territory.

Sheriff fees:

Service of summons	$1 00
Mileage, 2 miles	20
Total	1 20

Paid by pla-ntive in error.

100 [Endorsed:] In the Supreme Court. Levi Ankeny, plaintiff in error, *vs.* Van Buren Clark, defendant in error. Citation. Filed March 5th, 1889. Francis Henry, clerk.

101 TERRITORY OF WASHINGTON, *Supreme Court,* } *ss:*

I, Francis Henry, clerk of the supreme court of the Territory of Washington, do hereby certify that the within and foregoing is a true copy of the record, including all papers, exhibits, and other proceedings, in the foregoing cause of Levi Ankeny against Van Buren Clark, as appear- by the files and records thereof now remaining in my office. I also certify that the original petition for writ of error, prayer for reversal of judgment, assignment of errors, affidavit of amount in controversy, bond, writ of error, and citation upon same are hereto attached.

Seal Supreme Court, Washington Territory.

In testimony whereof I have hereto set my hand and the seal of said supreme court, at Olympia, in said Territory, on this 30th day of July, A. D. 1889.

FRANCIS HENRY,
Clerk of Supreme Court of Wash. Territory.

[Endorsed:] Levi Ankeny *vs.* Van Buren Clark. Transcript.

Endorsed on cover: Case No. 13,599. Washington Territory supreme court. No. 391. Levi Ankeny, plaintiff in error, *vs.* Van Buren Clark. Filed August 9, 1889.

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Office Supreme Court U. S.
FILED.
DEC 8 1892
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1892.—Term No. 64.

LEVI ANKENY, Plaintiff in Error,

vs.

VAN BUREN CLARK.

In Error to the Supreme Court of the late Territory of Washington.

BRIEF OF PLAINTIFF IN ERROR.

JOHN H. MITCHELL,
Attorney for Plaintiff in Error.

Press of McGill & Wallace, Washington, D. C.

IN THE

Supreme Court of the United States.

October Term, 1892.

Levi Ankeny, Plaintiff in Error, *vs.* **Van Buren Clark.**	}	No. 64.

In Error to the Supreme Court of the late Territory of Washington.

STATEMENT OF CASE.

This cause is here on writ of error to the Supreme Court of the late Territory of Washington.

The salient points of the case will be most readily gathered from the pleadings, which are brief.

Complaint.

The complaint of the defendant in error, who was plaintiff in the court below, is as follows:

In the District Court of the Territory of Washington and for the First Judicial District thereof, holding terms at Walla Walla, in and for the counties of Walla Walla and Franklin.

Complaint.

Van Buren Clark, Plaintiff,
vs.
Levi Ankeny, Defendant.

Plaintiff, complaining of defendant, for cause of action alleges:

1st. That between the 23d day of September, A. D. 1883, and the 10th day of October, A. D. 1885, both inclusive, plaintiff sold and delivered to defendant at the county of Walla Walla, Washington Territory, twelve thousand seven hundred and sixty-seven and one-third bushels of wheat.

2d. That the same was and is reasonably worth the sum of fifty cents per bushel, or in all, six thousand three hundred and eighty-three dollars and forty-one and two-thirds cents, lawful money of the United States.

3d. That the said defendant has not paid the said sum of six thousand three hundred and eighty-three dollars and forty-one and two-third cents, or any part thereof, although the same is long since due and payable.

Wherefore plaintiff demands judgment against the said defendant for the sum of six thousand three hundred and eighty-three dollars and forty-one and two-thirds cents, lawful money of the United States, together with interest thereon, at the rate of ten per cent. per annum, from the 10th day of October, A. D. 1885, until paid, and for costs and disbursements herein.

E. K. Hanna and
Allen, Thompson & Crowley,
Attorneys for Plaintiff.

It will be observed this complaint develops an ordinary action of assumpsit to recover the reasonable value of a certain amount of wheat alleged to have been sold and delivered by the plaintiff in the court below to the defendant. (Record, 2.)

To this complaint the defendant, Ankeny, interposed the following answer:

Answer.

The defendant, answering the complaint of the plaintiff in the above-entitled action, denies each and every allegation in said complaint contained.

First. That on the 20th day of October, 1882, the plaintiff, for value received, made, executed, and delivered to the defendant a certain note in writing in the words and figures following, to wit:

WALLA WALLA, W. T., *Oct. 20th, 1882.*

For value received I promise to pay to Levi Ankeny or order twelve thousand (12,000) bushels of good, merchantable wheat, said wheat to be delivered to the owner of this note at any railroad station in Walla Walla County, W. T., and payments to be made as follows: On or before Oct. 15th, 1883, four thousand bushels; on or before October fifteenth, 1884, four thousand bushels, and on or before October 15th, 1885, four thousand (4,000) bushels; the owner of this note to furnish sacks for said wheat.

VANBUREN CLARK.

Second. That at the same time and place the plaintiff duly made, executed, acknowledged, verified, and delivered to defendant a certain chattel mortgage in the words and figures following, to wit:

Know all men by these presents that Vanburen Clark, of the county of Walla Walla and Territory of Washington, mortgagor, for and in consideration of seven thousand dollars, in gold coin, to him in hand paid by Levi Ankeny, of the county of Walla Walla and Territory of Washington, mortgagee, the receipt whereof is hereby acknowledged, h*ave*, and by these presents *do*, sell, assign, convey, and set over unto the said Levi Ankeny and to his heirs and assigns all the following-described personal property, to wit: All the crops of grain that shall be raised or grown on the northeast quarter of section 19 and the northwest quarter of section 20, in township 8 north, of range 37 east, in the county of Walla Walla and Territory aforesaid, in the years 1883, 1884, and 1885; which conveyance is nevertheless made to secure the payment of 12,000 bushels of wheat, 4,000 on or before Oct. 15th, 1883, 4,000 on or before the 15th of Oct., 1884, and 4,000 on or before Oct. 15th, 1885, according to the conditions of a certain chattel note made by the said mortgagor to the said mortgagee, of even date herewith, which note is given for the use and occupation of said premises and to secure the said mortgagee, the rents, use, and profits of the same, the said mortgagee being the owner of the same: and if such payment be made, then this conveyance to be void. But it is expressly agreed by the parties that if the said property or any part thereof be removed from Walla Walla county, or in any way interfered with or molested, or if the said mortgagee shall, from any cause, deem himself insecure, then, in either event, the said indebtedness shall immediately become due and collectible, notwithstanding the provisions of said note to the contrary, and the mortgagee may immediately proceed to foreclose this mortgage, and have and take all necessary proceedings to sell said property, and retain and apply the proceeds thereof to the payment of said indebtedness and interest, and the costs and expenses of such proceedings and sale, and the sum of three hundred dollars as attorney's fees in said suit or proceedings, which the mortgagor covenants and agrees to pay in case any suit or proceedings be instituted to collect said note or any part thereof.

In witness whereof the said mortgagor has hereunto set his hand and seal this 20th day of October, 1882.

VANBUREN CLARK. [SEAL.]

Signed and executed in presence of—
B. L. SHARPSTEIN,
E. H. MORRISON.

TERRITORY OF WASHINGTON, } ss.
County of Walla Walla.

I, B. L. Sharpstein, a notary public in and for the Territory and county aforesaid, do hereby certify that on this 20th day of October, A. D. 1882, before me personally appeared Vanburen Clark, whose name is subscribed to the foregoing mortgage, to me personally known to be the same person described in and who executed the same, and acknowledged to me that he executed the same freely and voluntarily for the use and purposes therein expressed.

In witness whereof I have hereunto set my hand and notarial seal the day and year in this certificate above written.

B. L. SHARPSTEIN,
[SEAL.] *Notary Public.*

TERRITORY OF WASHINGTON, *County of Walla Walla.* } *ss.*

Vanburen Clark, the mortgagor in the foregoing mortgage named, being first duly sworn, deposes and says that the aforesaid mortgage is made in good faith and without any design to hinder, delay, or defraud creditors.

VANBUREN CLARK.

Subscribed and sworn to before me this 20th day of October, 1882.

B. L. SHARPSTEIN,
[SEAL.] *Notary Public.*

Third. That said chattel mortgage was duly recorded on the 23d day of October, 1882, in the county auditor's office of Walla Walla County, Washington Territory, in Book "D," Chattel Mortgages, at page 364, records of said county, and all the wheat delivered to defendant by plaintiff was delivered and received as payment on said note and not otherwise.

Wherefore defendant demands judgment for his costs and disbursements in this action.

B. L. SHARPSTEIN,
(Record, 3.) *Attorney for Defendant.*
J. L. SHARPSTEIN,
[NOTARIAL SEAL.] *Notary Public.*

Replication.

To this answer the plaintiff, Clark, made the following reply:

VANBUREN CLARK, Plaintiff,
vs.
LEVI ANKENY, Defendant.

Reply.

Said plaintiff, by way of reply to the answer on file herein, admits the execution and delivery of the note and chattel mortgage set forth in said answer, but denies that all or any of the wheat delivered to defendant by plaintiff was delivered or received as payment on said note; and by way of a further reply to said answer plaintiff alleges:

1st. That on the 20th day of October, 1882, the said defendant agreed to sell to plaintiff, and plaintiff agreed to purchase from said defendant, certain real estate for the agreed price of twelve thousand bushels of wheat, upon the delivery of which to defendant said defendant undertook, covenanted, and promised to convey to plaintiff, his heirs and assigns forever, by a good and sufficient deed of conveyance, with the usual covenants of warranty, the said real estate, together with all and singular the tenements and appurtenances thereunto belonging, the terms and conditions of which said contract are more fully set forth in a certain bond, under seal, for a deed duly executed and acknowledged by said defendant on said day and by him delivered to plaintiff, of which the following is a copy:

Know all men by these presents that I, Levi Ankeny, am held and firmly bound unto Van Buren Clark in the penal sum of $10,000.00; for the payment of which sum well and truly to be made, I bind myself, my heirs and executors, firmly by these presents.

Sealed with my seal and dated this 20th day of October, A. D. 1882.

The conditions of the above obligation are such that whereas the above obligor has sold and agreed to convey to the above obligee the following-described real estate in Walla Walla County, Washington Territory, to wit:

The northeast quarter of section 19 and the northwest quarter of section 20, in township eight north, of range thirty-seven east, of the Willamette meridian, subject to a mortgage for $3,000 and interest thereon from Sept. 1st, 1882, which said Clark is to pay when and as due, on the payment by the obligee to the obligor of 12,000 bushels of wheat according to the terms of a certain wheat note of even date herewith, made by obligee to the obligor:

Now, therefore, if the said obligor shall, upon the payment of said wheat note, convey said premises to the obligee, his heirs or assigns, subject to said mortgage for $3,000, then this obligation to be void; otherwise to be and remain in full force.

Said payment, however, to be a condition precedent; and a failure to make any payment at the time or in the manner specified in said note shall discharge the said obligor from all obligation to convey the said premises, and the obligor may immediately take possession of said premises, and all crops on said premises shall be owned and held by the obligor each year until the payment specified in said note for said year has been fully made.

LEVI ANKENY. [SEAL.]

In presence of—
WM. STINE,
B. L. SHARPSTEIN.

TERRITORY OF WASHINGTON, } ss.
County of Walla Walla. }

I, B. L. Sharpstein, a notary public in and for the Territory and county aforesaid, do hereby certify that on this 20th day of October, A. D. one thousand eight hundred and eighty-two, personally appeared before me Levi Ankeny, whose name is subscribed to the foregoing instrument, to me personally known to be the same person described in and who executed the said instrument, and he acknowledged to me that he executed the same freely and voluntarily for the use and purposes therein expressed.

B. L. SHARPSTEIN,
[SEAL.] *Notary Public.*

That at the time of the execution and delivery of the said instrument, and as a part of the said contract, and as a means of evidencing and securing said agreed purchase price for said land, the plaintiff executed and delivered the note and mortgage in said answer set forth, and that there was no other consideration for said note and mortgage or either of them.

That said plaintiff performed all the terms and conditions of said contract on his part to be performed, and duly delivered to defendant all the said wheat by him to be delivered according to the terms thereof, and that said defendant so received the same.

That after the said plaintiff had so performed said contract in the delivery of said wheat to defendant he duly demanded of defendant that defendant convey said real estate to plaintiff as by his said bond he had undertaken to do.

That said defendant then and there neglected and refused so to do, and has ever since and still does neglect and refuse to grant and convey said premises to plaintiff by any good or sufficient deed, and that said defendant has no title to the northeast quarter of section nineteen, in township eight north, of range 37 east, of said real estate, and since the making of his said contract was not the owner or seized in fee or at all of said land. Plaintiff alleges that the wheat mentioned and described in his complaint, except the excess thereof over the requirement of said bond, is the purchase price of said land advanced and paid by plaintiff to defendant, and that by reason of his said neglect and refusal and inability to perform the said contract the said defendant became and is indebted to plaintiff for the reasonable value of said wheat, and that such demand constitutes the cause of action in the complaint pleaded.

Wherefore plaintiff asks judgment as in the complaint.

E. K. HANNA and
ALLEN, THOMPSON & CROWLEY,
(Record, 6.) *Attorneys for Plaintiff.*

The court will observe from these pleadings that the plaintiff in the court below in his replication wholly changes the cause of action from one of assumpsit, as in complaint stated, to one for the recovery of the value of certain wheat delivered by him to the plaintiff in error in pursuance of an alleged contract for the purchase of certain pieces and parcels of land described in the replication and which contract, although no such allegation appears either in the reply or in any of the pleadings, is *assumed* to have been rescinded for good cause by the plaintiff, Clark, and by reason of which he became entitled to recover from Ankeny the reasonable value of the wheat delivered in pursuance of the contract.

On the issues thus joined the cause was, on November 12, 1887 (Record, 11), submitted to a jury, who under direction of the court, returned a verdict as follows:

> "We, the jury in the case of Van Buren Clark, plaintiff, against Levi Ankeny, defendant, find for plaintiff for six thousand nine hundred and fifteen & $\frac{50}{100}$ dollars.
>
> M. Clinton, *Foreman.*"

Saturday, *November 12th, A. D. 1887.*

The court at the close of the evidence having instructed the jury as follows:

> "Gentlemen of the Jury: The plaintiff is entitled to a verdict in this case for six thousand nine hundred and fifteen & $\frac{50}{100}$ dollars, and you will find accordingly." (Record, 11.)

To the above charge of the court the defendant excepted, and his exception was allowed (Record, 19).

Previous to the trial the following stipulation of the parties as to the facts was signed by the respective attorneys for plaintiff and defendant and filed in the cause (Record, 16):

Stipulation.

In the District Court of the Fourth Judicial District of Washington Territory, holding terms at Sprague.

V. B. Clark, Plaintiff,
vs.
Levi Ankeny, Defendant.

It is hereby stipulated and agreed by and between the parties to the above-entitled action that the following are facts in the above-entitled action and are admitted as such without proof:

1. That that certain map of definite location hereto attached, marked "Ex. A," by agreement, and that certain map hereto attached, marked "Ex. B," by agreement, together with the accompanying letters thereto

attached, were received and placed on file in the United States land office at the times they and each of them purport to have been received and filed, and are the copies they respectively purport to be.

2. That the main line of the Northern Pacific Railroad Company was constructed and completed in the year 1880, on the route and line indicated and laid down on the aforesaid maps, to Wallula, and after examination and report by commissioners, as provided in the act of Congress, duly appointed for said purpose, "said road was accepted by the President of the United States, as provided in said act."

3. That on May 30, 1881, the Northern Pacific Railroad Company duly made, executed, and delivered to Peter Huff a warranty deed for the northeast quarter of section 19, township 8 north, range 37 east.

4. That on December 13, 1881, the said Peter Huff, together with his wife, duly made, executed, and delivered to the defendant a warranty deed for the said northeast quarter of said section 19.

5. Plaintiff delivered to defendant the following wheat at the following dates, to wit: 4,167 bushels December, 1883, and 8,600 bushels September, 1885; and said wheat was delivered by plaintiff to defendant and accepted by defendant in pursuance of the terms of the bond set out in plaintiff's reply and as the purchase price of said land in said bond described; that 767 bushels of said wheat was, after the delivery, ascertained to be in excess of the amount called for by the terms of said contract, and that the value of all of said wheat was and is fifty cents per bushel.

6. That defendant delivered to plaintiff the possession of the land described in said bond on the date of said bond.

7. That on November 16th, 1886, plaintiff served on defendant a notice, which is hereto attached, marked "Ex. C," and within ten days thereafter quit possession of said land, and then notified defendant he had rescinded the contract and had quit the possession of said land, and tendered defendant possession thereof.

8. That the rental value of the land described in contract during the time the same was in possession of defendant under said contract was twenty-one hundred and twenty-seven dollars.

No objection is made to the competency of the foregoing stipulated facts, but each party reserves the right at any and all times to object to any and all thereof, upon the ground that the same or any thereof are irrelevant or immaterial.

Notwithstanding this stipulation, either party may offer such evidence as they or either of them may see fit, not inconsistent with said stipulation.

Dated Nov. 11th, 1887.

E. K. HANNA and
ALLEN, THOMPSON & CROWLEY,
Attorneys for Plaintiff.
B. L. & J. L. SHARPSTEIN,
RUFUS MALLORY, and
BRENTS, ANDERS & CLARK,
Attorneys for Defendant.

Endorsed: Clark *vs.* Ankeny. "Stipulation of facts."

November 12, 1887, the plaintiff in error, Ankeny, by his attorneys, submitted the following motion to set aside the verdict of the jury and for a new trial, which motion was overruled by the court (Record, 19):

Motion for New Trial.

In the District Court of the Territory of Washington and for the Fourth Judicial District thereof, holding terms at Sprague.

VAN BUREN CLARK, Plaintiff,
vs.
LEVI ANKENY, Defendant.

Now comes the defendant and moves the court to set aside the verdict of the jury in the above-entitled action and for a new trial in said action upon the following grounds and for the following reasons:

1. Because the court erred in admitting any evidence in said action against the objection of defendant; to which ruling defendant then and there excepted, and the exception — allowed by the court.

2. Because the court erred in admitting evidence of the delivery of wheat by plaintiff to defendant; to which ruling defendant then and there excepted, which exception was allowed by the court.

3. Because the court erred in refusing to allow the defendant to prove the rental value of the land during the time the same was occupied by plaintiff under the contract, and in overruling the offer of defendant to prove the rental value of said land during said time; to which ruling defendant duly excepted.

4. Because the court erred in refusing to admit any evidence as to the rental value of the real property during the time same was in the possession of plaintiff; to which ruling defendant then and there excepted, and the exception was allowed by the court.

5. Because the court erred in overruling the offer and excluding the evidence offered by defendant to prove that the mortgage mentioned in the bond was not paid by the plaintiff as and when due or at all, and that prior to the payment of the wheat plaintiff had made such default, and that in September, 1887, an action was commenced to foreclose said mortgage, and that afterwards and prior to the commencement of this action said action resulted in a decree of foreclosure and sale thereunder of all the property mentioned in the bond to one A. R. Burford, and that plaintiff did not, at the time he claims he notified plaintiff that he intended to rescind, or at any time, pay or offer to pay either the interest on said debt or the costs of said action or any thereof; to which ruling defendant then and there excepted, and the exception was allowed by the court.

6. Because the court erred in refusing to allow the defendant to prove that plaintiff did not, at the time he claims that he offered to rescind the contract, tender to defendant or offer to account to defendant for the rent, issues, or profits of said land contracted to be sold during the time he, plaintiff, occupied the same; to which ruling defendant then and there excepted, and the exception was allowed by the court.

7. Because the court erred in refusing to give the following instruction to the jury at the request of defendant:

1. The plaintiff must recover, if he can recover at all, upon the cause of action stated in his complaint and not upon what is stated in his reply to defendant's answer. The cause of action stated in his complaint is for wheat sold and delivered by him to defendant. The pleadings, proofs, and admissions of the parties show that this wheat was delivered only as payment on a certain contract, as the purchase price of certain real estate. These facts are inconsistent with the allegations of plaintiff's complaint, do not sustain such allegations, and your verdict should be for the defendant;" to which refusal the defendant then and there excepted, and the exception was allowed by the court.

8. Because the court erred in refusing to give the jury the following instructions asked by defendant:

"2. The plaintiff could not rescind the contract mentioned in his reply without placing or offering to place the defendant in the same situation as to the property and his rights that he, defendant, was at the time of the execution of the contract of purchase, unless that had been rendered impossible by the act of defendant;" to which refusal defendant then and there excepted, and the exception was allowed by the court

9. Because the court erred in refusing to instruct the jury as follows at the request of of defendant:

"3. Plaintiff could not rescind the contract without accounting or offering to account for the rents and profits of the land agreed to be sold while he was in possession of the same;" to which ruling defendant then and there excepted, and the exception was allowed by the court.

10. Because the court erred in refusing to instruct the jury as follows at the request of the defendant:

"4. If the plaintiff knew the nature of defendant's title to the land at the time he did any act under the contract, such as delivering wheat as a part payment of the purchase price, he could not thereafter rescind the contract on account of failure of title (if such there be), and could not for that reason recover the purchase price;" to which ruling defendant duly excepted.

11. Because the court erred in refusing to instruct the jury as follows at the request of defendant:

"5. If plaintiff, by himself or his attorneys, informed defendant he would not receive a quit-claim deed or a bargain and sale deed, defendant need not tender such a deed, as the law will not require a man to do an idle thing;" to which ruling defendant then and there excepted, which exception was allowed by the court.

12. Because the court erred in refusing to instruct the jury as follows at the request of defendant:

"6. A bargain and sale deed is all defendant would be required to tender and deliver if he had title, and would be a sufficient compliance with the terms of the contract on this point;" to which ruling defendant then and there excepted, and such exception was allowed by the court.

13. The court erred in refusing to instruct the jury at request of defendant—

"That a quit-claim deed would be a sufficient compliance with said contract if defendant had a title to the land in fee simple;" to which ruling defendant then and there duly excepted, and the exception was allowed by the court.

14. Because the court erred in refusing to give the following instruction at defendant's request:

"7. There is no evidence that defendant had not a good title to the land contracted to be sold;" to which defendant then and there excepted, and the exception was allowed by the court.

15. The court erred in refusing to instruct the jury as follows at defendant's request:

"8. The act of Congress of July 2, 1864, entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific coast, by the northern route;' the filing of the map of definite location under said act; the building and completion of said road under said act to Wallula; the examination of the same by the commissioners, and acceptance of the same by the President of the United States, gave to the Northern Pacific Railroad Company a fee-simple title to all land included in limits of said grant to Wallula, to which point said road was completed;" to which ruling defendant excepted, and such exception was allowed.

16. Because the court erred in refusing to give at the request of defendant the following instruction:

"9. You are instructed that the land in question, viz., N. E. ¼ sec. 19, township 8 north, of range 37 east, is within the limits of the Northern Pacific land grant as earned by the completion of the road to Wallula;" to which ruling defendant excepted, and the exception was allowed by the court.

17. Because the court erred in refusing to instruct the jury, at request of defendant, as follows:

"10. If the Northern Pacific Railroad Company had title to the land described in the deed to defendant, such deed gave the title to defendant;" to which ruling defendant then and there excepted, and such exception was allowed by the court.

18. Because the court erred in refusing to give the following instruction at the request of defendant:

"13. If plaintiff, by himself or by his attorneys, notified defendant that he would not accept any deed except a general warranty deed, with full covenants, it would have been idle for defendant to have tendered any other deed; and if any other deed would have satisfied the condition of the bond, defendant would have been by this declaration of plaintiff excused from tendering the same;" to which ruling defendant duly excepted, which exception was allowed by the court.

18. Because the court erred in ruling that the bond required the defendant to give a general warranty deed with full covenants; to which ruling defendant duly excepted, and said exception was allowed by the court.

19. Because the court erred in instructing the jury as follows:

"Gentlemen of the jury, plaintiff is entitled to a verdict in this case for $6,915.50, and you will find accordingly."

To the giving of which instruction defendant duly excepted, and the exception — allowed by the court.

Because said verdict is against the law and evidence.

B. L. and J. L. SHARPSTEIN and
BRENTS, ANDREWS & CLARK,
Attorneys for Defendant.

Which motion was overruled by the District Court and judgment entered on the verdict (Record, 41).

All the material facts as developed on the trial, with the alleged errors, will appear from the statement of facts in bill of exceptions. (Record, 22–28.)

Bill of Exceptions.

In the District Court of the Territory of Washington and for the First Judicial District thereof, holding terms at Sprague.

V. B. CLARK, Plaintiff,
vs.
LEVY ANKENY, Defendant.
Statement of Facts.

The above-entitled action came on for hearing in the above-entitled court on the 11th day of November, 1887. The plaintiff appeared by his attorneys, Allen, Crowley & Thompson, and E. K. Hanna, and the defendant by his attorneys, B. L. & J. L. Sharpstein and T. H. Brents, and the hearing of said action proceeded as follows: A jury was duly impaneled and sworn to try said action. The parties, plaintiff and defendant, entered into a stipulation of facts, subject to objection, as therein stated, which stipulation is hereto attached, marked "Stipulation of Facts," and made a part hereof.

Plaintiff offered in evidence subdivisions "5" and "7" of said stipulation, and the defendant, by his attorneys, objected to said subdivisions of said stipulation or either of them being read in evidence, and objected to any evidence being received to prove the allegations of plaintiff's reply, upon the ground that the same and all such evidence was immaterial and irrelevant and did not prove or tend to prove the allegations of plaintiff's complaint, and that said reply did not state facts sufficient to constitute a defence to the matter stated in defendant's answer, and because said reply is inconsistent with plaintiff's complaint; which said objection was overruled by the court; to which ruling defendant, by his attorneys, duly excepted, and said exception was allowed by the court. Defendant then objected to the admission of any evidence of the delivery of said wheat by plaintiff to defendant; which objection was overruled by the court; to which ruling defendant then and there, by his said attorneys, duly excepted; which exception was allowed by the court. Plaintiff offered to read in evidence said division No. 5 of said stipulation, and defendant then objected to subdivision No. 5 being read in evidence; which objection was overruled, and defendant then and there excepted to said ruling; which exception was allowed by the court. Plaintiff then offered to read in evidence a duly-certified copy of a bond, a copy of which bond is hereto attached, marked "bond," and made a part hereof. Defendant objected to said bond being received or read in evidence upon the ground that the same was immaterial and irrelevant; which objection was overruled by the court; to which ruling defendant duly excepted, and said exception was allowed by the court.

V. B. Clark, a witness produced by the plaintiff, testified substantially as follows:

My name is Van Buren Clark. I am the plaintiff. I know the defendant, Levi Ankeny. I entered into a contract with him for the purchase of land—the same land mentioned in the bond in this case, which the witness identified and referred to. After I had delivered all the wheat called for by the bond I went to Mr. Ankeny's bank and told him that, having complied with the contract on my part, I wished him to deliver me a deed for the land, as agreed upon. He said, "All right;" to come in the following Saturday and I should have it. I went to his bank at that time and saw him, but the deed was not given me. I called the third time upon Mr. Ankeny at the bank—this was some time later—and told him I had fulfilled the contract upon my part and wanted him to make me out the deed, or, if he did not do that, to pay me for my wheat. He said to me, "Clark, you have bothered me enough about this matter; I don't want to be bothered by you any more about it." I then turned and left the bank. Some time after this I again went to the bank in company with Milton Aldrich, and Ankeny told me that I was owing notes to the bank, of which he was president, and when I paid up those notes he would make me a deed to the land. I told him I could not pay the notes until I had a title to the land, so that I might be able to borrow money upon it; that the notes were all right, and when I could thus raise money I would pay them. He told me to see his attorneys, Mess. B. L. & J. L. Sharpstein. I met Mr. B. L. Sharpstein, who said I could have the deed when I paid my notes at the bank. He afterwards told me I could have a deed

—that is, a warranty deed—to the land in section 20 and a quit-claim deed to the land in — 19, and if I was called upon to use my land right under the land laws of the United States to get the title to the land in — 19, I could have pay for what I should pay out in this way; but no arrangement of this kind was ever agreed upon. I recollect being in Sharpstein's office on other business after this and before the action was commenced, but do not think a deed was offered me there at all. I am quite sure that it was not, but if it had been offered me I should have recollected it. I never got a deed of any kind; I never saw any deed. A few days after November 16, 1886, the date on which I gave Mr. Ankeny the written notice which was mentioned in the stipulation, a copy of which is in evidence, marked "Ex. C," I went to the bank, taking Mr. Stanfield, a neighbor, along as a witness with me, and told Mr. Ankeny that I surrendered the land in the bond described back to him and quit the possession of it. He said, "All right." This was about all the talk. Ankeny turned to some other matter, and we went out of the bank. At the time I entered into the bond for the purchase of the land I did not know that any part of it was railroad land. I was a stranger in the country at the time and knew nothing about railroad land, and did not learn until about two months afterwards that any portion of it was.

William Stanfield, being sworn as a witness of plaintiff, testified substantially as follows:

My name is William Stanfield. I am a farmer. I live in Walla Walla County and know the parties to this action. I went along with the plaintiff when he went to the bank of Ankeny, in November, 1886, and heard the conversation between plaintiff and defendant. Mr. Clark asked me to go along as a witness. Plaintiff said to Ankeny he surrendered the possession of the land back to him and that he went out of the possession of it. Ankeny said, "All right," and that is about all that was said between them.

Milton Aldrich, being sworn as a witness for plaintiff, testified substantially as follows:

I have known the parties to this action for some time. I was in Ankeny's bank prior to November 16, 1886, and heard something of a conversation between plaintiff and defendant. Plaintiff asked defendant to give him a deed for the land. Defendant asked plaintiff about paying some notes he owed to the bank, and plaintiff said he would settle them when he got his deed to the land. Defendant told plaintiff to go to Mess. Sharpsteins, his attorneys, about the deeds. This is about so much of the conversation as I heard.

Plaintiff rested.

Thereupon defendant moved the court for a judgment of non-suit, which motion was overruled and denied by the court; to which ruling of the court defendant duly excepted, and the exception was allowed by the court. Defendant then read all of said stipulation of facts except subdivisions 5, 7, and 8. Defendant offered to read in evidence subdivision No. 8 of the aforesaid stipulation of facts; to the reading of which plaintiff objected; which objection was sustained by the court; to which ruling defendant duly excepted and said exception was allowed by the court. Defendant offered to prove the rental value and the value and use of the occupation of said land in said bond described during the time the same was occupied by plaintiff under said contract; to all of which offered evidence the plaintiff objected, and the said objection was sustained by the court; to which ruling the defendant excepted and the said exception was allowed by the court. Defendant offered to prove that the mortgage for three thousand dollars, mentioned in the bond, had not been paid by plaintiff, and that plaintiff had not paid the same or any part thereof; that the said mortgage had been duly foreclosed and the property duly sold in said foreclosure action subsequent to November 16, 1886, to which action the parties to this action were defendants; to all of which evidence the plaintiff objected, and the said objection was sustained by the court; to which ruling defendant duly excepted, and the said exception was allowed by the court.

Defendant called as a witness LEVI ANKENY, who, being duly sworn, testified as follows:

I am defendant in this action. I signed the instrument referred to as the bond herein with the plaintiff. I have been at all times willing and ready to give plaintiff a deed, but not a warranty deed. My wife and myself executed a deed and left it with my attorneys, Messrs. B. L. & J. L. Sharpstein, and I told plaintiff this deed was there. This deed was not a warranty deed. I never at any time told plaintiff he could not have a deed to the land without paying his indebtedness to the bank or made the payment of this indebtedness a condition of his receiving a deed. When plaintiff came and notified me that he tendered me the possession of the land I may have said "Is that all?" or something of that kind.

On cross-examination, in answer to the inquiry whether the conversation had not taken place between himself and Clark, as testified to by the other witnesses, he said he supposed they had, or substantially so. I did not at any time intend to consent to a reversion of the contract or to use language intending any such thing.

J. L. **Sharpstein**, a witness produced by the defendant, being first duly sworn, testified in substance as follows:

I am one of the attorneys of the defendant. I know the parties to this action. After Clark claimed he was entitled to a deed and before the notice marked "Ex. C" was received, I had prepared a deed from defendant and wife to the plaintiff for the land mentioned in the bond herein. This deed was executed and acknowledged and left with our firm as attorneys for defendant, to be delivered to plaintiff when he called for it. The plaintiff came into our office about this time on other business, and I informed him that a deed was in the office for him. I think the deed was on the office table at that time. He inquired if it was a warranty deed, and I told him it was not, and he replied that he did not want it. This was the substance of our conversation. I think I never had but two conversations with plaintiff on this subject before this action was commenced, and did not know what became of the deed after plaintiff refused to receive it. I did not take any particular notice of it after that, and have not looked for it since this action was commenced, but think it may be in the office yet.

B. L. **Sharpstein**, being duly sworn, testified in substance as follows:

That he was one of the attorneys for defendant; that as such he met plaintiff and W. G. Langford in the office of Langford & Hanna, in Walla Walla city, in the summer or fall of 1886, and had a conversation in relation to the land described in the bond from defendant to plaintiff. Langford wished to know what kind of a deed the defendant was willing to make under the bond. I offered, for Ankeny, to give plaintiff a warranty deed for the land in section 20, and a quit-claim deed or a warranty deed, expressing a small consideration, for the land in section 19, or the railroad land, as we called it, and if the railroad title failed Ankeny would pay all expenses in procuring title from the Government, if Clark should take the land under the homestead or pre-emption law. I was authorized by Ankeny to make the offer. Plaintiff said he would be willing to do that if Ankeny would pay for his rights as a homesteader or pre-emptor, if he had to use one of them to perfect title. I asked him what price he would place on his right. He said he could not tell. Nothing further was ever done about this proposition. Afterwards plaintiff informed me he would not accept such a deed as I mentioned. I never told plaintiff he could not have a deed without paying his notes in the bank.

Plaintiff, being recalled, testified that he was in Sharpstein's office in regard to a matter not connected with this case, and did not recollect the conversation testified to by John L. Sharpstein in regard to having a deed, and thinks he would recollect it if it had occurred; that he saw no deed on that occasion, nor was any deed shown him or pointed out to him or offered to him on that occasion, according to his best recollection.

E. K. Hanna, being called as a witness in rebuttal for plaintiff, testified in substance—

That he was one of the attorneys for plaintiff, and had been the law partner of W. G. Langford, and the firm had been plaintiff's attorneys in this action; that he had heard conversations in the office between B. L. Sharpstein and his law partner, Judge Langford, in relation to this matter, but did not recollect of either plaintiff or Judge Langford for him saying that plaintiff would not accept any other than a warranty deed. I was in the office at a number of conversations between Judge Langford and B. L. Sharpstein, we acting for plaintiff and he for defendant. I could not say that I was present at all of the conversations, but in none of them where the deed was spoken of did I hear plaintiff or any one for him say that he would not accept any other than a warranty deed.

Defendant asked the court to give to the jury the instructions hereto attached, marked "instructions asked by defendant," which are made a part hereof, and give the jury each of said instructions. The court refused to charge the jury as requested by defendant or give to the jury any of said instructions asked by defendant, and defendant excepted to said ruling, which exception was allowed by the court.

Defendant excepted to the ruling of the court refusing to give to the jury instruction No. 1 asked by defendant, which ruling was duly excepted to by defendant.

Defendant excepted to the ruling of the court refusing to give to the jury instruction No. 2 asked by defendant, which ruling was duly excepted to by defendant.

Defendant excepted to the ruling of the court refusing to give to the jury instruction No. 3 asked by defendant, which ruling was duly excepted to by defendant.

Defendant excepted to the ruling of the court refusing to give to the jury instruction No. 4 asked by defendant, which ruling was duly excepted to by defendant.

Defendant excepted to the ruling of the court refusing to give to the jury instruction No. 5 asked by defendant, which ruling was duly excepted to by defendant.

Defendant excepted to the ruling of the court refusing to give to the jury instruction No. 6 asked by defendant, which ruling was duly excepted to by defendant.

Defendant excepted to the ruling of the court refusing to give to the jury instruction No. 7 asked by defendant, which ruling was duly excepted to by defendant.

Defendant excepted to the ruling of the court refusing to give to the jury instruction No. 8 asked by defendant, which ruling was duly excepted to by defendant.

Defendant excepted to the ruling of the court refusing to give to the jury instruction No. 9 asked by defendant, which ruling was duly excepted to by defendant.

Defendant excepted to the ruling of the court refusing to give to the jury instruction No. 10 asked by defendant, which ruling was duly excepted to by defendant.

Defendant excepted to the ruling of the court refusing to give to the jury instruction No. 11 asked by defendant, which ruling was duly excepted to by defendant.

Defendant excepted to the ruling of the court refusing to give to the jury instruction No. 12 asked by defendant, which ruling was duly excepted to by defendant.

Defendant excepted to the ruling of the court refusing to give to the jury instruction No. 13 asked by defendant, which ruling was duly excepted by the defendant.

Thereupon the court instructed the jury as follows:

"Gentlemen of the Jury: Plaintiff is entitled to a verdict in this case for six thousand nine hundred and fifteen and $\frac{50}{100}$ dollars, and you will find accordingly."

To the giving of which instruction defendant then and there excepted, and said exception was allowed by the court.

That said jury thereupon, while in their box and without retiring to deliberate upon the verdict, returned a verdict in accordance with said instruction, for the sum of six thousand nine hundred and fifteen and $\frac{50}{100}$ dollars; and thereupon defendant, by his said attorneys, gave due notice of a motion to set aside said verdict and for a new trial, and on said day, to wit, November 12, 1887, said defendant filed said motion and served the same on plaintiff's attorneys, and the hearing of said motion was adjourned until the 16th day of March, 1888; on which day said motion came on for a hearing, and was, after argument by the attorneys for the respective parties, plaintiff and defendant, overruled and denied by the court; to which ruling defendant then and there duly excepted, and said exception was allowed by the court.

That at the times the said several rulings hereinbefore mentioned were made the defendant moved the court to have the same entered on the journal of said court, which said several motions were overruled, to which rulings defendant then and there duly excepted, and said several exceptions were allowed by the court.

Agreement.

It is hereby stipulated and agreed by and between the parties to the above action that the foregoing, from page 1 to page 13, inclusive, is a true and correct statement *of the facts and all thereof* in the above action, and that the judge of the above-entitled court may sign and certify the same as such. All notice of the application to settle the same is hereby waived.

E. K. HANNA and
ALLEN & CROWLEY,
Attorneys for Plaintiff.
B. L. & J. L. SHARPSTEIN,
Attorneys for Defendant.

Certificate.

I, George Turner, Associate Justice of the Supreme Court of Washington Territory, and judge of the above-entitled court, do hereby certify that the above statement of facts from page 1 to 13, inclusive, contains *all of the facts* in the above entitled action.

Dated and done at Spokane Falls, this 16th day of March, 1888.

GEORGE TURNER,
Judge of above-entitled Court.

(Record, 29.)

On the foregoing record the case was taken from the District to the Supreme Court of the late Territory, in which latter court the judgment of the District Court was affirmed, with, however, a slight modification only so far as to suspend the issuance of execution until the defendant in error should execute a proper and sufficient release for cancellation of the bond mentioned in the case, and deposit such release or cancellation with the clerk of the District Court for the use of the plaintiff in error (Record, 36).

For opinion, by Chief-Justice Burke, affirming the judgment of the District Court, see Record, 30–36, inclusive.

ASSIGNMENT OF ERRORS.

FIRST.

The court erred in holding that the defendant in error could recover under the pleadings in this action.

SECOND.

The court erred in holding that the defendant in error could treat the contract as rescinded and recover without *pleading* a rescission, or facts entitling him to treat the contract as rescinded, neither of which he did.

THIRD.

The court erred in not allowing the plaintiff in error to present evidence as to the value of the use of the premises while held by the defendant in error under the contract, as admitted by the stipulation of the parties, and in refusing to permit such stipulation in evidence.

FOURTH.

The court erred in sustaining the ruling of the District Court in declining to permit the defendant to introduce evidence tendered by him tending to prove that the mortgage mentioned in the pleadings was not paid by the plaintiff when due or at all; and that prior to the delivery of the wheat plaintiff had made such default, and that in September, 1887, an action was commenced to foreclose such mortgage, which resulted in a decree of foreclosure and sale thereunder of all of the property mentioned in the pleadings.

FIFTH.

The court erred in sustaining the ruling of the District Court in refusing to allow the defendant to introduce evidence tending to prove that at the time plaintiff offered to rescind the contract plaintiff did not make any offer to account to defendant for the rents, issues, or profits of said land contracted to be sold during the time the plaintiff occupied the same.

SIXTH.

The court erred in sustaining the District Court in the refusal to charge the jury as follows, as requested by the defendant: "The plaintiff must recover, if he can recover at all, upon the cause of action stated in his complaint, and not upon what is stated in his reply to defendant's answer. The cause of action stated in his complaint is for wheat sold and delivered by him to defendant. The pleadings, proofs, and admissions of the parties show that this wheat was delivered only as payment on a certain contract as the purchase price of certain real estate. These facts are inconsistent with the allegations of plaintiff's complaint, do not sustain such allegations, and your verdict should be for the defendant."

SEVENTH.

The court erred in sustaining the District Court in refusing to give the following instruction to the jury, as asked by the defendant: "The plaintiff could not rescind the contract mentioned in his reply without placing or offering to place the defendant in the same situation as to the property and his rights that the defendant was at the time of the execution of the contract of purchase, unless that had been rendered impossible by the act of defendant."

EIGHTH.

The court erred in sustaining the District Court in refusing to give the following instruction to the jury, as requested by the defendant: "The plaintiff could not rescind the contract without accounting or offering to account for the rents and profits of the land agreed to be sold while he was in possession of the same."

NINTH.

The court erred in sustaining the ruling of the court below in refusing to instruct the jury as follows, as requested by defendant: "If the plaintiff knew the nature of defendant's title to the land at the time, or did any act under the contract, such as delivering wheat as a part payment of the purchase price, he could not thereafter rescind the contract on account of the failure of title (if such there be) and could not for that reason recover the purchase price."

TENTH.

The court erred in sustaining the District Court in refusing to instruct the jury as follows, at the request of defendant: "If plaintiff by himself or his attorneys informed defendant he would not receive a quit-claim deed, or a bargain and sale deed, defendant need not tender such a deed, as the law will not require a man to do an idle thing."

ELEVENTH.

The court erred in sustaining the ruling of the District Court in refusing to instruct the jury as follows, at the request of the defendant: "A bargain and sale deed is all defendant would be required to tender or deliver if he had title, and would be a sufficient compliance with the terms of the contract on this point."

TWELFTH.

The court erred in sustaining the ruling of the court below in refusing to instruct the jury, at the request of the defendant, as follows: "That a quit-claim deed would be a sufficient compliance with said contract, if defendant had a title to said land in fee simple."

THIRTEENTH.

The court erred in sustaining the ruling of the District Court in refusing to give the jury the following instruction, at the request of defendant: "If plaintiff, by himself or by his attorneys, notified defendant that he would not accept any deed except a general warranty deed with full covenants, it would have been idle for defendant to have tendered any other deed, and if any any other deed would have satisfied the condition of the bond defendant would have been by this declaration of plaintiff excused from tendering the same."

FOURTEENTH.

The District Court erred in holding that the bond required the defendant to give a general warranty deed with full covenants, and the Supreme Court while correctly holding to the contrary erred in assuming, in the absence of any evidence to support the assumption, that plaintiff in error had no title, and therefore could convey none.

FIFTEENTH.

The court erred in sustaining the ruling of the court below in refusing to give the following instruction to the jury at the request of the defendant: "There is no evidence that defendant had not a good title to the land contracted to be sold."

SIXTEENTH.

The court erred in holding, in the absence of any evidence to that effect, that the plaintiff in error had no legal title to the land in controversy, and that the defendant in error had the right to rescind on that ground.

SEVENTEENTH.

The court erred in holding that no legal title passed to the Northern Pacific Railroad Company under their grant from the United States to the lands embraced within the grant, and in holding that in order to vest such title a patent should have issued.

EIGHTEENTH.

The court erred in holding that the defendant in error need not reconvey the interest in the land conveyed to him by plaintiff in error, or tender conveyance thereof as a condition precedent to bringing his action, but that he could do so after judgment in the Supreme Court of the territory.

NINETEENTH.

The court erred in sustaining the District Court in charging the jury as follows:

> "*Gentlemen of the Jury:* The plaintiff is entitled to a verdict in this case for $6,915 and 50-100 dollars, and you will find accordingly." (Record, 20.)

TWENTIETH.

The court erred in affirming the judgment of the lower court, and in rendering judgment against the plaintiff in error under the pleadings and evidence in this action.

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Attorneys for Plaintiff in Error.

POINTS OF LAW AND AUTHORITIES.

POINT I.

The plaintiff must recover, if he recover at all, upon the cause of action stated in the complaint. He can not in his reply be permitted to introduce a new cause of action and recover upon that.

School District of the City of Hastings *v.* Caldwell, 19 Northwestern Rep., 634;
Distler *v.* Dabney, 23 Nor. W. Rep., 335;
Brown *v.* McCune, 5 Sanford Sup. C., 224;
Trainer *v.* Wouman, 25 N. W. Rep., 401;
Campbell *et al.* *v.* Mellen, 61 Wis., 612;
Durbin *v.* Fisk, 16 Ohio St., 533;
Duponti *v.* Mussy, 4 Wash. C. C. Rep., 128;
Burnheimer *v.* Marshall, 2 Minn., 78;
Hatch *v.* Coddington, 32 Minn., 92;
Hite *v.* Wells, 17 Ills., 88;
McConnell *v.* Kibbe, 29 Ill., 483;
Burdell *v.* Denig, 15 Fed. Rep., 397;
Andrews *v.* Andrews, 14 Pac. Rep., 68.

Under the code of Washington, section 73, abolishing all forms of pleading inconsistent with the provisions of the code, and section 76, providing that the complaint shall contain a plain and concise statement of facts constituting the cause of action, a complaint alleging that on a certain day defendant became indebted to plaintiff in a certain sum, as for money had and received from plaintiff, will not support an action for the recovery of money paid by plaintiff to defendant on a contract for the purchase of land, the right of recovery being based on defendant's failure to comply with the conditions of the contract.

Distler *v.* Dabney, 28 Fed. Rep., 335:

The above case decided by the Supreme Court of the State of Washington is directly in point and in its ruling is conclusive in favor of the position assumed by the plaintiff in error in this case. In that case the plaintiff alleged in his complaint that defendant became indebted to him between the 21st day of October, 1889, and the 12th day of June, 1890, in the sum of $767.65 had and received from said plaintiff by the said defendant for the use of said plaintiff. The complaint contained an averment of demand of payment and refusal to pay. The answer of defendant denied the debt in a general way and set up as a further defense that the money payments mentioned in the complaint were paid by plaintiff to defendant as part payment on certain lots of land which defendant had contracted in writing to sell and deed to plaintiff on certain conditions. The written contract is set out. The answer further averred that afterwards, at the request of plaintiff, the time of payment and the execution and delivery of the deeds specified in the contract were extended, and that in compliance with said contract and said agreed extension of time, defendant executed and tendered to plaintiff a deed to said land, which plaintiff refused to accept. He replying, admits the contract pleaded by defendant, and admits that the payments set forth in the complaint were paid under said contract and alleges that the plaintiff complied with the conditions of said contract; that the defendant failed to comply therewith and to deliver plaintiff a deed to said land within the time prescribed by the contract. The defendant moved the court for a judgment on the pleadings, objected to the testimony offered by plaintiff, and at the close of the plaintiff's testimony moved for a nonsuit, which motion was overruled. On review in the Supreme Court of the State, that court, November 25, 1891, reversed the decision of the court below, and in delivering the opinion Mr. Justice Dunbar, among other things, said:

It is contended by the appellant that there was a fatal variance between the allegations in plaintiff's complaint and the proof offered upon the trial, and that the complaint and reply are inconsistent with each other. It appears from the reply, and is conceded by the respondent, that the action was based upon the alleged breach of contract. Under the fictions of the common law and the license given to plead presumptions, and what the pleader conceived to be the legal effect and operation of the facts instead of the facts themselves, this form of contract might have been sustained in this kind of an action; but under the code system of pleadings another rule is laid down. Fictions are abolished and presumptions are not to be pleaded as facts, but the facts themselves must be stated. Section 73 of the code provides as follows: "Sec. 73. All the forms of pleadings heretofore existing in civil actions inconsistent with the provisions of this code are abolished, and hereafter the forms of pleadings, and the rule by which the sufficiency of the pleadings is to be determined, shall be as herein prescribed." Let us now see what form of pleading is prescribed. Section 76 prescribes that the complaint shall contain a plain and concise statement of facts constituting the cause of action. It is a "plain and concise statement of facts" which the law requires, and not their legal effect, or the legal conclusions inferred from them with the commendable object in view, no doubt, of informing the defendant of the exact nature of the claim against him, and of the facts relied upon to establish it, so that he can answer intelligently and directly, without leaving him mystified and uncertain as to whether he has drawn the right deduction from legal presumptions so that the true matters in issue can be brought directly to the attention of the court and of the jury. Mr. Pomeroy, in his masterly work on Remedies and Remedial Rights, in analyzing the phrase "cause of action," as used by the codes, describes it as consisting of two distinct elements: (1) The plaintiff's primary right and defendant's corresponding primary duty; (2) the delict or required act or omission of defendant. These two separate and distinct elements, in combination, constitute the cause of action. The primary right and duty by themselves are not the cause of action, because when existing by themselves, unbroken by the defendant's wrongs, they do not give rise to any action. For this reason that definition is clearly wrong which pronounced the debt in an action on the contract or trust in a suit to enforce a trust to be the cause of action. * * * The two elements consist entirely of affirmative acts wrongfully done, or of negative omissions wrongfully suffered by the defendant, and its statement in a pleading can be nothing more than a narrative of such acts or omissions.

While it is true that courts have been slow, and justly so, to change established rules of pleading which have received the sanction of ages, and under which rights have adjudicated from time immemorial, it is equally true that courts are as much bound to observe and enforce the plain mandatory provisions of the statute in regard to pleadings as they are its mandatory provisions on any other subject; and, while the courts in many of the States still adhere to and sustain the old practice, it seems to us, as expressed by Mr. Pomeroy, that this is substantially the repealing of an express statutory provision by judicial construction, and we can not refrain from quoting the following apt language of this eminent writer in his review of the opinion in Booth *v.* Bank, 1 N. Y. Super. Ct., 45: "To sum up the foregoing criticism, the whole course of reasoning pursued by the learned judge assumes that the most technical, arbitrary, and fictitious distinctions between the ancient forms of actions are still subsisting. It does not merely ignore the legislation which has abrogated these distinctions, but it expressly denies the ability of the legislature to accomplish such a result. This is not interpreting, it is repealing, a statute." Some of the States, however, notably Minnesota and Oregon, have sustained the code system of pleading, both in letter and spirit. See Foerster *v.* Kirkpatrick, 2 Minn., 210, (Gil. 171); Bowen *v.* Emerson, 3 Or., 452. In this case it was held that, in an action for money due on a contract, facts should be stated showing that the contract existed between the parties, and that it had been broken. Following, then, the rule prescribed by the code, we find that section 86 provides that "when the answer contains new matter, constituting a defense or counter-claim, the plaintiff may reply to such new matter, denying generally or specifically each allegation controverted by him; and he may allege, in ordinary and concise language, without repetition, any new matter not inconsistent with the complaint constituting a defense to such new matter in the answer." *But in this instance the matters and things set up in the reply are inconsistent with the statement made in the complaint; for the cause of action stated in the complaint is money had and received by defendant for the use of plaintiff, while the cause of action stated in the reply is the breach of a specific contract.* To allow the plaintiff to prove his case on the averments of either the complaint or reply, as it happened to suit him, to obtain a judgment for money had and received, or upon a rescission of the contract for the purchase of land, as the testimony happens to serve, would be to allow him to go fishing for a judgment; while the defendant would be uncertain what he was called upon to defend until the testimony of plaintiff had been submitted. In Garvey *v.* Fowler, 4 Sandf., 665, the court said: "It is one of the merits of the code that general averments and general issues, which convey no information to the opposite party, and were frequently construed in a sense not only different from, but distinctly opposite to, that which their terms impute, are now abolished. The plaintiff must now state in his complaint all the facts which constitute the cause of action, and we are clearly of the opinion that every fact is to be deemed constitutive, in the sense of the code, upon which the right of action depends; every fact which the plaintiff must prove to enable him to maintain his suit, and which the defendant has a right to controvert in his answer, must be distinctly averred; and every averment must be understood as meaning what it says, consequently is only to be sustained upon evidence which corresponds with its meaning." This we believe fairly states the law and proper practice under the code procedure. In the case at bar there was no evidence offered corresponding with the meaning of any of the averments in the complaint, or which could sustain the complaint, and the nonsuit should have been allowed. The judgment is reversed, and the cause remanded, with instructions to proceed in accordance with this opinion.

Andres, C. J., and Stiles, Scott and Hoyt, J. J., concur.

The foregoing decision will be followed by this court.

When pending an appeal from a Territorial Court to the United States Supreme Court upon a question of local law the Territory is admitted as a State, and the State's Supreme Court thereof in another case reaches an opposite conclusion upon the same question, the latter decision will be followed by the Supreme Court of the United States.

Stutsman County (Dak.) *v.* Wallace *et al.*, decided Jan. 4, 1892, vol. 12, National Reporter, 227.

The case of Brown *v.* McCune (5 Sanford's Rep., 229), was one wherein the plaintiff brought an action to recover for the price of goods sold and delivered to the defendant. The sole defense set up in the answer was infancy of the defendant at the time of the alleged sale. The plaintiff in his reply took issue upon the question of infancy, and also made the following averment:

"That if the defendant was an infant at the time of the sale he falsely and fraudulently represented himself to be of age, and thereby induced the plaintiff to sell and deliver to him the goods."

The court, Sanford, Justice, in discussing the question as to whether evidence to support this averment of fraud should have been allowed to go to the jury, said:

"The first objection to this is found in the circumstance that the plaintiffs did not bring their action for damages by reason of fraud. The complaint is simply for goods sold and delivered. The reply, it is true, alleges the false representation as to the defendant's age, and that by that and other fraudulent practices he obtained the goods. But that does not obviate the objection. It is in the *complaint* and *not* in the *reply* that we are to look for the cause of action. If the plaintiffs had intended to change their ground of action from a demand upon contract to one for a fraud, they should have amended their complaint. The statement of the fraud for the first time in the reply did not avail to make it a cause of action. This objection is fatal to the offer to prove the purchase with the fraudulent intent of not paying for the goods, as well as to the rejection of the false representation as warranting of itself a recovery."

In Campbell *et al.* *v.* Mellen (61 Wis., 612), the plaintiffs in complaint demanded $340.13 on an account running from November 1, 1879, to March 1, 1882. The defendant in answer demanded $162.57 as the balance due on account of $775.53, running from September 21, 1878, to June 8, 1881, allowing a credit account of the plaintiffs' of $612.96. To this answer plaintiffs replied averring a settlement with the defendant January 31, 1880, leaving a balance in their favor of $11.10, and demanding this amount together with $329.03 on account subsequent thereto. The court said:

"The first error assigned is that the referee refused evidence of such settlement. The referee may very properly refuse to try in this action the *new case* made by the replication. It is elementary that the reply must be consistent with the complaint. This reply set up a new cause of action against the defendant of an account stated together with an unliquidated account entirely different from and inconsistent with that stated in the complaint, and both causes of action are for trial."

The case of Durbin *v.* Fiske (16 Ohio St., R., 533), is directly in point. In that case plaintiff sued as indorsee to recover from the maker a balance claimed to remain due and unpaid on a negotiable promissory note. It was an ordinary action at law on a promissory note. Nothing whatever was stated in the complaint upon which any equitable relief was or could be claimed. The defendant answered claiming the benefit of a payment which he alleged had been made upon the note sued on. This payment, it was alleged, consisted of the proceeds of the sale of certain real estate sold by order of the court in a judicial proceeding in equity between the same parties and purchased by the plaintiff, and which proceeds of sale had, by the order of said court, been applied in satisfaction fully or *pro tanto* of plaintiff's claim.

To this answer plaintiff interposed a reply in which he averred that he purchased the premises set out in answer in ignorance of the legal effect of a prior incumbrance thereon held by a stranger to the proceeding, though the existence of the prior lien was well known to him at the time of the sale, and that at a subsequent sale of such premises for the satisfaction of the prior lien, he found it necessary to repurchase the premises for his protection. And having, as he averred in this reply, through a mistake of law failed to derive from his first purchase the full benefit of a perfect title, he demands a judgment on the note as though the order of sale which he had procured, the confirmation of sale, and the order appropriating the proceeds had never been made. The court in passing on the case, said:

> "If his replication could be regarded as seeking equitable relief under the facts there stated, it is a total departure from the petition. And plaintiff can recover only on the cause of action stated in his petition. It is not the province of a reply to introduce new causes of action. This can only be done by amendment to the petition."

The rule in chancery proceedings in the Federal courts is similar to that for which we are contending as applicable to the lower courts. So long ago as in Duponti *et ux.* *v.* Mussy *et al.* (4 Wash. C. C., Rep., 128), Mr. Justice Washington said:

> "If the plaintiff discovers from the answer that it will be necessary for him to set forth new matter in order to oblige the defendant to answer it and to afford himself an opportunity of proving such new matter, the practice is to apply to the court for leave to amend the bill. Never-

theless, if the replication contains the essential qualities of a general replication, being a denial of such parts of the answer as are not intended to be admitted and also new matter, the court will consider such new matter as mere surplusage if the parties go on to a hearing, in which case the plaintiff will lose the benefit of it, although it should be supported by proof. If it be material to the plaintiff he should move to amend his bill and to state it therein."

The case of Hatch, executrix, *v.* Coddington *et al.* (32 Min., 93), was an action of replevin to recover possession of certain bonds. One of the defenses set up in the answer was a former adjudication in an action of trover relating to the same subject-matter. The reply set out in full the pleadings, issues, evidence, and proceedings in the former action. The court, after reviewing the case and holding that under the facts as presented the judgment in the former suit operated as an estoppel, said:

"The plaintiff, however, suggests that in a common-law action of trover nothing but the right of possession is determined, but that in a civil action under the code the court may grant the party any relief to which he may show himself entitled; and he then resorts to the reply to show that plaintiff has some equitable interest in these bonds; that defendant held them only as security for damages for breach of a certain contract between him and the M. & P. R. Co., and that plaintiff is entitled to an accounting to ascertain the extent of defendant's interest, and that while this could not be done in the common-law action of trover it can be done in an action like the present under the code; in brief, that, under the code, a complaint to recover specific personal property, setting up absolute ownership and right of possession, may, in connection with the reply, be turned into a bill of accounting. *But it is elementary that a reply can not take the place of a complaint so as to change the character of the action or enlarge the rights and remedies of the plaintiff.* It will not avail that the reply may disclose certain rights in plaintiff which might have been made the

> grounds of complaint. These rights must be set up in the complaint, so that the defendant can, by answer, traverse them. There are no facts stated in the complaint showing that plaintiff is entitled to any such relief, and there is nowhere in the record any suggestion that any such relief is sought. True, the complaint asks for other and further relief, and it is also true that where the defendant answers, the court may grant a plaintiff relief not demanded in the complaint. But the general relief thus granted must be upon facts established *by evidence admissible under the pleadings and consistent with the case made by the complaint and embraced within the issue.* The prayer for relief is not traversable, and forms no part of the cause of action."

So in the case at bar plaintiff should have set out his contract in his complaint, as also the facts on which he claimed the right to rescind, in order that the defendant might have an opportunity to traverse the same.

McConnell *v.* Kibbe (29 Ill., 483) was an action on the case for a nuisance, to which a plea of the statute of limitations was interposed in the answer. To this plaintiff replied, averring that the injury resulted from a *continuance of the nuisance,* and within five years before the suit was brought. The court held:

> "When suit is brought on *one* cause of action to which a complete bar is presented, the plaintiff cannot, by his replication, set up and rely upon *another* cause for a recovery."

In Burdell *v.* Denig *et al.* (C. C. S. D. Ohio, 15 Fed. Rep., 397), the court (Baxter, Justice), after stating the condition of the pleadings, said:

> "The replication is an effort to go behind the case made by the declaration and add another and different cause of action. To this defendant demurs, and we think the demurrer is well taken."

The real question is, has there been a departure from the cause of action set out in the complaint by the averments contained in the replication. The real test as to whether there is a departure is this: Could evidence of the facts alleged in the reply be received under the allegations of the complaint? If not, then there is departure.

The court, Gilfillan, C. J. (Minnesota Supreme Court, 25 N. W. Reporter, 401), in discussing this question, says:

"This being so, there is, so far as the allegations in reply may be claimed to help the complaint, a clear case of departure in the pleadings; for the complaint alleges and relies on a complete performance of the contract according to its terms, while the reply admits a failure to perform as to time, and relies on new matter therein alleged as an excuse for such failure. There is a departure when a party quits or departs from the case or defense which he first made, and has recourse to another. L. Chit. Pl., 644; Gould Pl. c. 8, secs. 65, 66, 72; Warren *v.* Powers, 5 Conn., 373; Larned *v.* Bruce, 6 Mass., 57; Estes *v.* Farnham, 11 Minn., 423 (Gil., 312). A test of departure suggested in the last case is, could evidence of the facts alleged in the reply be received under the allegations of the complaint? If not, then there is a departure. It needs only a statement of it to show that an allegation of full performance will not admit proof of an excuse for non-performance.

"The plaintiff should have drawn his complaint according to the facts; or, if he did not so draw it in the first instance, he ought to have made it conform to the facts as soon as he received the answer apprising him that he would be required to prove his case as he alleged it. The defendant raised his objection properly by his request for a charge, in effect, that plaintiff could recover *only upon proof of performance as alleged in the complaint.*"

In Bernheimer *v.* Marshall & Co. (2 Minn., 79), the court said:

"A defective complaint, or one which does not state facts sufficient to constitute a cause of action, can not be cured by the necessary averments in the reply. The complaint must contain all the allegations necessary for the plaintiff to maintain his action."

White *v.* Joy, 3 Kernan, 83;
Gould's Pl., 172, secs. 7, 11, and 12;
Chitty Pl., vol. 1, 255, and cases cited.

In Hite *v.* Wills (17 Ills., 88), the court said:

"Each count of a declaration must truly set out the contract and cause of action, and if the evidence does not sustain the count, the action fails; *a party can not in any subsequent pleading change the contract so as to present a new or different cause of action.*"

There was a Departure in Pleading.

A departure in pleading is defined thus: When a party quits or departs from the case or defense which he has made and has recourse to another.

White *v.* Joy, 13 N. Y., 83;
1 Chit. Pl., 644;
Coke on Littleton, 304 a, 20 J. R., 160.

This was done in the case under consideration. The matters set out in the reply are inconsistent with the statement made in the complaint. The cause of action stated in the complaint is assumpsit for the recovery of the reasonable value of certain wheat alleged to have been sold and delivered to defendant by plaintiff, while the cause of action stated in the reply is the alleged breach of a specific contract. The evidence to support the theory of the reply would have been inadmissible to sustain the averments in the complaint, and *vice versa.* As so well said, substantially, by the Supreme Court of the State of Washington in the case of Distler *v.* Dabney, 28 Fed. Rep., 335, *supra*: "To allow the plaintiff to prove his case on the averments of either the complaint or reply, as it happened to suit him, to obtain a judgment in assumpsit for wheat sold and delivered, or for damages upon a rescision of the contract for the purchase of land, as the testimony happens to serve, would be to allow him to go fishing for a judgment, while the defendant would be uncertain what he was called upon to defend until the testimony of plaintiff had been submitted."

It is true, as stated in authority quoted in opinion of the court below (McManus *v.* Ophir Silver Mining Co., 4 Nev., 15), that all mere formal defects in a complaint are waived by a plea of confession and avoidance, but such is not this case. The complaint in the case at bar is in all respects complete in and of itself, and presents an action of assumpsit pure and simple for the reasonable value of wheat alleged to have been sold and delivered by the plaintiff to the defendant; whereas the reply tenders an entirely different issue—a *new* case. It is a departure tendering an issue, the evidence in support of which would have been wholly inadmissible in support of the issue tendered by the complaint. Besides, the answer is not a confession and avoidance; it is a complete denial of every averment in the complaint.

A departure from the complaint in a reply to the answer was not a cause for demurrer under the code of Washington in existence when this action was commenced and tried.

White *v.* Joy, 13 N. Y., 83.

The code of Washington (code of 1881) under which the pleadings in this case were made up, is a copy—in so far as it relates to pleading—of the New York code of 1849, and is as follows:

> "When the answer contains new matter constituting a defense or counter claim, the plaintiff may reply to such new matter, denying generally or specifically each

allegation controverted by him, or any knowledge or information thereof sufficient to form a belief, and he may allege in ordinary and concise language without repetition any new matter not inconsistent with the complaint constituting a defense to such new matter in the answer." (Washington Code, 1881, p. 47.)

While the code of Washington, 1881, sec. 89, like the New York code of 1849, provides as follows:

"Sec. 89. The defendant may demur to any new matter contained in the reply when it appears on the face thereof that such new matter is not a sufficient reply to the facts stated in the answer."

In the case of White *v.* Joy, 13 New York, 83 (*supra*), the court held that where a reply set out new matter "*inconsistent with the complaint,*" and was, therefore, a departure in pleading, a demurrer by defendant would not lie.

In this view, therefore, the defendant, Ankeny, raised the objection to this anomalous pleading in reply, at the only time and in the only manner left open to him, namely, on the trial.

Point II.

The plaintiff must *plead* and *prove* a rescission of the contract, or such facts as entitle him to treat it as rescinded. In this action he has done neither.

Riddell *v.* Blake, 4 Call., 264;
Thayer *v.* White, 3 Cal., 228;
O'Reilly *v.* King, 28 How., Pr. Rep., 408;
Shultz *v.* Christman, 6 Mo. Appeals, 338;
Clay *v.* Hart, 49 Tex., 433.

The Supreme Court of the late Territory held (see Opinion, Record, 33) very properly that the reply in this case was defective in not pleading a rescission of the conplaintiff in the court below (Record, 6), and this it must be borne in mind only relates to *one moiety* of the land covered by the bond for a deed:

> "And that said defendant has no title to the N. E. ¼ of sec. 19, in township 8 N., of range 37 E., of said real estate, and since the making of said contract was not the owner or seized in fee or at all of said land."

No question, it will be perceived, is made as to Ankeny's title to the 160 acres in section 20.

There is, moreover, no averment of title in the United States or of a paramount title in any other person. There is no claim even that this land or any part of it was included in the grant to the Northern Pacific R. R. Co., or that said company had in any respect failed to comply with the terms of the grant. There was no issue, nor could there be any joined in the pleadings as to the existence or non-existence of title in the defendant, as he had no opportunity under the law of pleading to deny the above averment in plaintiff's reply.

There is no Evidence to Support any Claim of Lack of Title in Ankeny.

POINT IV.

But not only is there no sufficient averment of paramount title in another that entitles plaintiff to insist on a rescission of the contract, but conceding such averment sufficient *there is absolutely no evidence to support it.*

The bill of exceptions (Record, 22–28) *purports* to give and *does give all the evidence* given on the trial by either party, as also all offered and rejected by the court. The whole case, therefore, is before this court—there was no *finding of facts* by which this court is bound—as the court took the case from the jury; there is no room, therefore, for this court to indulge in presumptions as to what other evidence *may* have been introduced on the trial.

Not merely do we insist, therefore, that the evidence is *insufficient*, but rather that there is *absolutely no evidence in its support*, nor is there anything in the Record from beginning to end to justify an inference that the defendant, Ankeny, did not have either an equitable or legal title to all the lands in question, while the evidence (see Stipulation, Record, 16) is ample to show *affirmatively* that he had such legal title. In fact, it was conceded by the plaintiff in the Record, as already stated, that as to one-half the land—the northwest quarter of section 20, township 8 north of range 37 east—he had a good legal title. The only claim advanced, and that in the vague, insufficient manner above indicated, is that as to the other half, the northeast quarter of section 19, township 8 north of range 37 east, the defendant, Ankeny, had no title. As to why he had no title both pleading and evidence are silent as the grave, but in argument and in the opinion of the court below it is *assumed* the reason is because forsooth it is a part of and included in the grant of lands made by Congress to the Northern Pacific Railroad Company by the act of July 2, 1864 (13 Stats., 365), coupled with the further unwarranted assumption that no patent had ever issued to such company.

Assuming, therefore, as we rightly may, that in any event the burden of showing a paramount title in another or a lack of title in defendant Ankeny is on the plaintiff Clark, what is the evidence upon which this claim is made? The only scintilla of evidence offered in any manner bearing upon this question or having any reference to it are the following portions of the stipulation of the parties, dated November 11, 1887, and on that date filed in this case (Record, 16):

> "It is hereby stipulated and agreed by and between the parties to the above-entitled action that the following are facts in the above-entitled action and are admitted as such without proof:

"1. That that certain map of definite location hereto attached, marked "Ex. A," by agreement, and that certain map hereto attached, marked "Ex. B," by agreement, together with the accompanying letters thereto attached, were received and placed on file in the United States Land Office at the times they and each of them purport to have been received and filed and are the copies they respectively purport to be.

"2. That the main line of the Northern Pacific Railroad Company was constructed and completed in the year 1880, on the route and line indicated and laid down on the aforesaid maps, to Wallula, and after examination and report by commissioners, as provided in the act of Congress duly appointed for said purpose, "said road was accepted by the President of the United States, as provided in said act.

"3. That on May 30, 1881, the Northern Pacific Railroad Company duly made, executed, and delivered to Peter Huff a warranty deed for the northeast quarter of section 19, township 8 north, range 37 east.

"4. That on December 13th, 1881, the said Peter Huff, together with his wife, duly made, executed, and delivered to the defendant a warranty deed for the said northeast quarter of said section 19."

The plaintiff did not even offer in evidence on the trial the above portion of said stipulation. (Record, 22.) He did offer in evidence subdivisions 5 and 7 *only* of such stipulation, and they were admitted by the court. (Record, 22.) Subdivisions 1, 2, 3, and 4, above quoted, were, however, offered in evidence by defendant, Ankeny, and admitted by the court. (Record, 23.)

It is respectfully submitted on such evidence the court was not warranted in taking the case from the jury on the assumption that, on the showing made, defendant, Ankeny, had no title to the land, or a moiety of the land in question.

The Court Below Misinterpreted and Misapplied the Rulings of this Court on the Subject of Congressional Land Grants.

POINT V.

The Supreme Court of the Territory, it will be observed (Record, 34–35), based its ruling on the doctrine laid down by this court, first, in the case of Railway Co. *v.* Prescott, 16 Wall., 603, approved in Railway Co. *v.* McShane, 22 Wall., 462, and adhered to in N. P. R. R. Co. *v.* Trail County, 115 U. S., 606.

We do not controvert the doctrine of these cases; on the contrary give to it that cordial assent to which an adjudication of such a thoroughly considered question by this court is entitled. The doctrine enunciated in these cases is simply this as applicable to the Northern Pacific grant, and it can not affect this case.

That the proviso in the act of July 17, 1870 (16 Stats., 305), to the effect "that before any land granted to said company by the United States shall be conveyed to any party entitled thereto under any of the acts incorporating or relating to said company, there shall first be paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same by the said company or party in interest," exempts such lands from State or Territorial taxation until such payment is made into the Treasury.

All that can possibly be claimed for the principle enunciated in these cases, and all ever intended, it is respectfully submitted by this court, is simply this: that *until* the company has complied with the provisions of the above proviso and paid into the Treasury of the United States the cost of surveying, selecting, and conveying the lands claimed, the United States may withhold the *evidence* of a legal title already vested in virtue of a *present grant*, in order to protect its lien for the cost of surveying, selecting, and conveying the lands, and that in such case, until patent does issue, the lands shall not be subject to State or Territorial taxation.

That such was the construction this court intended should be given to the doctrine enunciated in the cases of Railway Co. *v.* Prescott, 16 Wall., 603; Railway Co. *v.* McShane, 22 Wall., 444; and Northern Pacific Railroad Co. *v.* Trail County, 115 U. S., 600, is made entirely plain in the case of Deseret Salt Company *v.* Tarpey, 142 U. S., 241. It was there held that the provision in the statute requiring the cost of surveying, selecting, and conveying the land to be paid into the Treasury before a patent could issue, does not impair the force of the operative words of transfer in the act.

Mr. Justice Field, in delivering the opinion in that case, after stating and reaffirming the doctrine so long and uniformly held by this court—to the effect that these land grants (the Central Pacific, Northern Pacific, and other like grants) were grants *in præsenti*, and that the *legal* title to the granted lands, as distinguished from merely equitable or inchoate interests, passed to the grantee company on the definite location of the road, and whenever the identification of a granted section becomes so far complete as to authorize the grantee to take possession,—referred to the provision that before any of the granted lands should be conveyed to any company there shall be first paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same, and said:

> "The object of this provision was to preserve to the Government such control over the property granted as to enable it to enforce the payment of these costs, and for that purpose to withhold its patents from the parties entitled to them until such payment. We do not think the provision was designed to impair the force of the operative words of transfer in the grants of the United States, *or invalidate the numerous conveyances by sale and mortgage*

of the lands made by the railroad company with the express or implied assent of the Government."

Mr. Justice Field, in this opinion, further said:

"The question naturally arises as to the necessity for patents if the title passed by the act itself upon the definite location of the road when the alternate sections granted had become identified. We answer that objection by saying that there are many reasons why the issue of the patents would be of great service to the patentees, and by repeating substantially what we said on that subject in Wisconsin Railroad Company *v.* Price County, 133 U. S., 496."

And, then, many reasons are mentioned why, *pro convenienti*, the issuance of a patent is not inconsistent with the doctrine that the legal title has already passed by the terms of the grant.

Surely, as in the case under consideration, where it is *affirmatively shown*, not only that the road has been completed adjacent to the lands in question, examined by the Government commissioners and accepted by the President of the United States, but also that the lands have been surveyed and selected and the company has conveyed them to a third party, who in turn by a like deed has conveyed the same to the defendant Ankeny; and when it is *not* shown or in any manner claimed that there has been any failure to pay into the Treasury the costs of surveying, selecting, and conveying such lands, or that no patent has issued, no court is justified, it is respectfully submitted, in *assuming*, either that there has been a failure to make the deposit as required, or that the Department has not issued a patent.

Upon the contrary, on the showing made by the stipulation, if presumptions are to be indulged in by the court, the most rational conclusion would be that the proper deposit had been made by the company and that patent had issued. But in any event, the question as to whether such deposit had been made, provided there was any issue on the subject, was one of *fact* for the jury, and the court committed, it is respectfully submitted, grievous error in taking the case from the jury on the assumption that the defendant Ankeny had no title.

If as a matter of fact the company had made the deposit as required—by the proviso in the act of 1870 (*supra*)—and surely in the absence of any plea or claim to the contrary the court will not hold it had not, then the *right* of the company to a patent would be complete, and under all the authorities the legal title vests in the grantee although a patent has not issued.

A Patent not Necessary to Vest the Legal Title to Lands Included in the Congressional Grant to the Northern Pacific Railroad Co.

Point VI.

The legal title of the United States to the public lands may pass as well by an act of Congress in the words of a *present grant* as by a patent; and the act granting lands to the Northern Pacific Railroad Company is a grant *in præsenti.*

Wilcox *v.* Jackson, 13 Pet., 498;
Rutherford *v.* Greene's Heirs, 2 Wheat., 196;
Stoddard *v.* Chambers, 2 How., 284;
Central Pac. R. R. Co. *v.* Dyer, 1 Saw., 631;
Meegan *v.* Boyle, 19 How., 130;
Railroad Co. *v.* Smith, 9 Wall., 35;
Schulenburg *v.* Harriman, 21 Wall., 44;
Langdeau *v.* Hanes, 21 Wall., 521–529;
Leavenworth, Lawrence and Galveston Railroad *v.* United States, 92 U. S., 733;
Barney *v.* Dolph, 97 U. S., 652;
Simmons *v.* Wagner, 101 U. S., 261;
Van Wyck *v.* Knevals, 106 U. S., 360;

Kansas Pac. R. W. Co. *v.* Dunmeyer, 113 U. S., 629;
Walden *v.* Knevals, 114 U. S., 373;
St. Paul and Pac. R. R. Co. *v.* Northern Pacific R. R. Co., 139 U. S., 1;
Wisconsin Railroad Co. *v.* Price County, 133 U. S., 496–510;
United States *v.* Missouri, Kansas, etc., R. Co., 141 U. S., 358–375;
Deseret *v.* Tarpey, 142 U. S., 241;
Sioux City, etc. Land Co. *v.* Griffey, 143 U. S., 32;
New Orleans Pacific Railway *v.* Parker, *Id.*, U. S., 42.

By the stipulation of the parties (Record, 16), including the certificate of the register and receiver of the local land office at Walla Walla, Washington, dated November 9, 1887 (Record, 29), and the letter to these officers of Hon. N. C. McFarland, Commissioner of the General Land Office, of date August 16, 1881 (Record, 29–30), and diagrams "Ex. A," and "Ex. B" (inserted between pages 28 and 29 of Record), and all of which are made parts of such stipulation, and all in evidence on the trial (bill of exceptions, Record, 25), it is made clear *affirmatively* by defendant Ankeny:

1st. That the 160 acres in section 19 described in Ankeny's bond are included in the grant to the Northern Pacific Railroad Company.

2d. That at and long prior to October 20, 1882, the date of Ankeny's bond for a deed, the Northern Pacific Railroad Company had not only definitely located its line of road adjacent to the lands in controversy, but had also, in the year 1880, completed the construction of such road on and over such line of definite location to Wallula, then Territory of Washington, and that such road had, after examination and report by commissioners duly appointed for said purpose as provided in the act of

Congress making the grant, "been accepted by the President of the United States as provided in said act."

3d. That on May 30th, 1881, the Northern Pacific Railroad Company, such lands having been surveyed and selected (160 acres in section 19, township 8 north of range 37 east), made, executed, and delivered to one Peter Huff a warranty deed for the same, and on December 13th, 1881, said Peter Huff, together with his wife, conveyed the same by like deed to the defendant, Ankeny.

4th. That on October 20th, 1882, at the time of the execution of bond for a deed, he, Ankeny, the defendant, then being in possession of said lands, under and in pursuance of such deeds, delivered possession thereof to the plaintiff, Clark. (Record, 16–17.)

It is respectfully submitted these conceded facts in view of the authorities (*supra*) show a *legal title* in defendant, Ankeny, on October 20th, 1882, to the northeast quarter of section 19, in township 8 north of range 37 east of the Willamette Meridian, Washington Territory. And this is so whether a patent as *evidence* of such title had at that date issued or not issued, and also irrespective of the question as to whether the company ever made a deposit to cover cost of surveying, selecting, and conveying the same.

The Record is absolutely silent, it must be remembered, both in the pleadings and evidence, as to whether deposit had ever been made by the company to secure the cost of surveying, selecting, and conveying these lands, and also on the subject of whether a patent had or had not issued therefor.

Therefore, from aught that appears in this case, leaving out of the question all presumptions, patent *may* have issued to the company for these lands, and that it *has* issued, it is respectfully submitted, is, in view of the facts just recited, the reasonable and proper presumption, and if it has, then, although the company may not have made the deposit for surveying, selecting, and conveying the same, under the decision of this court in the case of Railway Co. *v.* McShane, 22 Wall., 444 (*supra*), the lands became subject to State and Territorial taxation, as the United States had then no longer any control for any purpose whatever, the *legal title* having passed to the company by the terms of the grant, and the *evidence* of such legal title having also been transferred by the delivery of the patent.

Point VII.

The pleadings are destitute of any allegation as to the rescision of the contract; besides, no rescision by agreement is proven. The evidence is conflicting, but plaintiff's evidence, if uncontradicted, would not establish an agreement to rescind.

Dial *v.* Crain, 10 Tex., 444;
Pratt *v.* Morrow, 45 Mo., 404;
Thurston *v.* Ludwig, 6 Ohio St., 1;
Falls *v.* Carpenter, 28 Am. Dec., 592.

In any event, the question as to whether plaintiff, Clark, had complied with his part of the contract, as also whether there was a rescision of the same, were questions of fact for the jury under the instructions of the court, and it was grave error in the court in directing a verdict for plaintiff.

Point VIII.

To constitute a good ground for the rescision of a contract by reason of failure of consideration through want of title, *the failure must be total.*

2 Wheat., R, 13;
21 Wend., R, 131;
17 Wend., 188;
25 Wend., 107.

And the onus of showing it is on the party alleging it.

1 Greenleaf Ev., sec. 74;
3 Blackfork's Rep., 267;
25 Wend., 118.

At law where a party seeks to disaffirm and rescind a contract of sale to recover back a deposit of his purchase money on the ground of a defective title he must satisfy the court that the title is *absolutely bad* before he can recover. A mere doubtful title will not do.

O'Reilly *v.* King, 28 How. Pr. R., 410;
Romilly *v.* James, 6 Taunton, 263.

In the language of Lord Hardwicke (Lyddal *v.* Weston, 21 Atk., 20)—

> "The court must govern itself by a moral certainty, for it is impossible in the nature of things that there must be a mathematical certainty of a good title."

The court, in 28 Howard, *supra*, citing the above, says:

> "Where the doubt of the sufficiency of the title is reasonable and practical the court in its discretion will excuse performance by the purchaser."

The above is the *rule in equity*. But the court in the above case, proceeding further, says:

> "The rule, however, *at law*, is quite different. There the party disaffirming the contract must satisfy the court that the title is *absolutely bad* and the court must decide that it is *absolutely bad* before the party can recover. A mere doubtful title will not do."

Romilly *v.* James, 6 Taunton, 263.

Plaintiff should Account for the Rents of Profits of the Land while in Possession.

Point IX.

Plaintiff paid the wheat on the contract for the purchase of the land. He received possession of the land from the defendant under the same contract. This is admitted in the stipulation, and, in addition, it is proven. It is also admitted that the use of said land while held by the plaintiff under the contract was of the value of $2,127. (See stipulation of parties, Record, 16). If the plaintiff is entitled in this action to rescind the contract, or treat it as rescinded and recover the value of the wheat paid on the contract, he should deduct the value of that which he received under it.

Meyer *v.* Shoemaker, 5 Barb., 319;
McIndoe *v.* Morman, 26 Wisc., 588;
Dusenbury *v.* Lehamier, 46 How. Pr., 417;
Boston *v.* Clifforf, 68 Ill., 67;
Cobb *v.* Hatfield *et al.*, 46 N. Y., 533;
Burg *v.* The Cedar Rapids and Mo. R. R. Co., 32 Iowa, 101;
Sheard *v.* Welburn, 34 N. W. Rep., 716;
Masson *v.* Bouvet, 1 Denio, 69;
Fratt *v.* Fiske *et al.*, 17 Cal., 380.

POINT X.

The court excluded that part of the stipulation in which the parties had agreed as to the value of the use of the premises while held by the plaintiff under the contract of purchase, and also rejected all evidence of the value of the rents, issues and profits arising from plaintiff's possession, and directed a verdict for plaintiff for the full value of the wheat paid on the contract, with interest. Whether this ruling was based upon the supposition that it did not constitute a counter claim or set-off, or that defendant had not plead it, we are not advised. If the latter reason, it was clearly error, for there had been no opportunity to plead it. Where there has been no opportunity to plead a cross demand, it may be proven without pleading.

Hart *v.* Cooper, 47 Cal., 47;
Davenport Savings Fund and Loan Association *v.* The North American Insurance Co., 16 Iowa, 74;
Davis *v.* Payne *et al.*, 45 Iowa, 194;

If the defendant was bound to convey, plaintiff was bound to prepare and tender the deed to plaintiff for execution, or, after demand, should allow him a reasonable time for its preparation.

3 Wend., 250;
6 Cow., 13;
1 Denio, 546;
8 Mo., 689;
11 Ala., 840;
15 Pick., 546.

Ankeny's Bond did not Obligate Him to Make a Warranty Deed. A Quit Claim was Sufficient.

POINT XI.

The condition of the bond is that upon the payment, etc., the defendant should "*convey the premises to the plaintiff, his heirs or assigns.*" (Record, 7.) Any deed that would convey a good title to the premises described in the bond would be a compliance with the terms of the contract, both in letter and spirit. This a quit claim from Ankeny would do, provided the legal title was in him.

Kyle *v.* Kavanaugh, 103 Mass., 356;
Pugh *v.* Chesseldine, 11 Ohio, 109;
Same case, 37 Am. Decs., 414;
Van Eps *v.* The Mayor, Aldermen, and Commonalty of the City of Schenectady, 12 Johns., 436;
Ketchum *et al.* *v.* Evertson, 13 Johns., 359;
Hill *v.* Hobart, 16 Me., 164.

The Supreme Court of the late Territory of Washington, in passing on this case, conceded the above doctrine, and dissented in this respect from the ruling of the District Court.

The whole case in the courts below, it will be perceived upon an examination of the Record, turned *solely* upon the erroneous assumption by such courts that the title to one moiety of the lands in question was still in the United States, although no averment to such effect is anywhere to be found in any of the pleadings, nor yet is there any support for such claim in any of the evidence or stipulation of the parties. The District Court, however, went further and held that, although conceding Ankeny had title, he was bound under his bond to convey by a *deed with covenants of warranty*, and that a quit claim or deed of bargain and sale was not sufficient. This position of the District Court, however, is swept away by the Supreme Court of the late Territory (see opinion of Chief-Justice Burke, Record, 33):

> " The whole controversy between the parties in this case seems to have arisen out of a suspicion, which both parties evidently entertained, of the soundness of the title to the quarter section known as the " railroad land." Fearing this title, the defendant in error was averse to receiving a quit-claim deed and seemed to think that under his contract he was entitled to a warranty deed.
>
> " In this construction of his contract he was mistaken. By the terms of the bond the vendor was bound, it is true, to convey to the vendee a good title to the land, but he was at liberty to convey it by any form of deed effectual for that purpose, and under the statutes of our Territory a quit-claim deed is just as effectual to convey the title to real estate as any other form of deed, and a grantee in a quit-claim deed is entitled to the same presumption as to *bona fides* and has the same rights as a grantee in a deed of general warranty. This is undoubtedly true of a quit-claim deed which purports on

its face to convey not merely an interest, but the real estate itself.

Laws of 1871, p. 195;
Code of Washington, secs. 2311, 2314, 2323, 2726, 2737;
Laws of 1885–'6, p. 177.

"By the statute of 1885–'6 above referred to it is provided that a quit-claim deed purporting to convey the interest of the grantor shall not be held to operate as a conveyance of an after-acquired title unless words are added expressing such intention.

"The operative words of such deed would in any event probably preclude the idea of its conveying an after-acquired title; but it is believed that under the statutes of this Territory relating to deeds and to their registration a deed in the form of a quit claim which purports on its face to convey the real estate would operate to convey even an after-acquired title.

"Such an instrument would be in effect a bargain and sale deed.

Laws of 1871, p. 195;
Code of Washington, 2311, 2314.

"The decisions of the Supreme Court of the United States to which our attention has been called are not applicable here, because, as we have seen, this subject is governed in this Territory by positive statutory regulation."

The territorial act, approved November 29, 1871, entitled "An act to make perfect titles to lands in Washington Territory," referred to in the above opinion, provides as follows:

"That whenever any person or persons having sold and conveyed by deed any lands in this Territory, and who, at the time of such conveyance, had no title to such land, and any person or persons who may hereafter sell and convey by deed any lands in this Territory and who shall not at the time of such sale and conveyance have the title to such land, and shall acquire a title to such lands so sold and conveyed, such title shall inure to the benefit of the purchasers or conveyee or conveyees of such lands to whom such deed was executed and delivered and to his or their heirs and assigns forever. And the title to such lands so sold and conveyed shall pass to and vest in the conveyee or conveyees of such lands and to his or their heirs and assigns and shall thereafter run with such land." (Laws of Washington Ty. (1871), pp. 195–196.)

If, therefore, as we insist, the defendant, Ankeny, had the legal title, a quit-claim deed duly executed by him and wife was all that was necessary to transfer such legal title to the plaintiff, Clark.

Did Ankeny make proper tender of such a deed, or did the plaintiff, Clark, by his acts and declarations do away with the necessity of such tender? It is submitted both these questions must be answered in the affirmative.

The Defendant Ankeny Made Proper Tender of Deed.

Point XII.

The court will not fail to observe that the plaintiff, Clark, in his notice to defendant, Ankeny, of date November 16, 1886 (Record, 31), admits that he, Ankeny, had tendered him a quit-claim deed for the lands in question, that is, for the 160 acres in section 19, and he further, in this same notice, declares in writing that he can not accept such a deed.

He says:

"I have learned that you have no title to one hundred and sixty acres of it. You have refused to give me *anything more than a quit-claim deed to this part of the land. I can not accept such a deed.*"

Or, in other words—"You have tendered me a quit-claim deed but I will not accept that kind of a deed. I must have a deed with covenants of warranty."

But not only so. The plaintiff, Clark, as a witness in his own behalf (Record, 24), testified under oath that he called on defendant, Ankeny, who, after some talk about a deed for the lands, told him to go and see his, Ankeny's, attorneys, B. L. and J. L. Sharpstein. He then goes on to testify further as follows:

> "I met Mr. B. L. Sharpstein, who said I could have the deed when I paid my notes at the bank.. *He afterwards told me I could have a deed, that is, a warranty deed, to the land in section 20 and a quit-claim deed to the land in section 19.*"

And yet, notwithstanding all these admissions, the court below in speaking of the defendant, Ankeny (Opinion, 35), says:

> "He failed to perform the contract on his part; he never to this day formally tendered a deed to defendant in error."

But in addition to these admissions of plaintiff, Clark, that he had been offered a quit claim for the lands in section 19 and a warranty deed for the lands in section 20, the defendant, Ankeny, testified as follows (see bill of exceptions, Record, 25):

> "I have been at all times willing and ready to give plaintiff a deed, but not a warranty deed. *My wife and myself executed a deed and left it with my attorneys, Messrs. B. L. and J. L. Sharpstein, and I told plaintiff this deed was there. This deed was not a warranty deed.*"

J. L. Sharpstein, Esq., Ankeny's attorney, testified as follows (see bill of exceptions, Record, 26):

> "After Clark claimed he was entitled to a deed, and before the notice marked 'Ex. C" was received, I had prepared a deed from defendant and wife to the plaintiff for the land mentioned in the bond herein. This deed was executed and acknowledged and left with our firm as attorneys for defendant, to be delivered to plaintiff when he called for it. The plaintiff came into our office about this time on other business, and I informed him that a deed was in the office for him. I think the deed

was on the office table at that time. *He inquired if it was a warranty deed, and I told him that it was not, and he replied that he did not want it. This was the substance of our conversation.*"

It is respectfully submitted this Record clearly shows two things—

1st. That plaintiff Clark, by his repeated declarations that he would not accept a quit-claim deed, relieved the defendant, Ankeny, from the necessity of making a tender; and,—

2d. That, notwithstanding this, defendant Ankeny did make proper tender of a good and sufficient deed, and still stands ready to deliver to plaintiff such a deed. But,—

3d. In any event the court erred in withdrawing this question of fact from the jury.

Plaintiff Clark has Wholly Failed to either Properly Aver or Prove Performance of Conditions on his part to be Performed.

POINT XIII.

The court will not fail to observe that in the bond for deed from Ankeny to Clark (Record, 6, 7), one of the conditions expressed therein is as follows:

"Subject to a mortgage for $3,000 and interest thereon from September 1, 1882, *which said Clark is to pay when and as due.*"

This, then, was one of the things to be done by Clark in part payment for the land. It was just as much a condition *precedent* to be performed by him before his right to a deed attached as was the delivery to Ankeny of the 12,000 bushels of wheat which he agreed to deliver within certain dates as part of the purchase price of said lands.

It will be further observed plaintiff in his reply makes no pretense whatever that he had paid this mortgage of $3,000, when and as due or at all; neither does it appear that he offered any evidence to that effect; but on the contrary, defendant offered to prove on the trial, not only that the said mortgage debt of $3,000, mentioned in the bond, nor any part thereof, had not been paid by plaintiff when and as due *or at all*, but further that the said mortgage had been duly foreclosed by a proceeding in court, and the property duly sold in such foreclosure proceeding subsequent to November 16, 1886, and in which proceeding to foreclose the parties to this action were defendants, to all of which evidence the plaintiff objected. The objection was sustained by the court, the evidence not permitted, and to which ruling of the court defendant, by his counsel, duly excepted. (Record, 25.) In any possible view, then, the court may take of these pleadings or of this case, it is respectfully and confidently submitted that this was manifest error.

The District Court was not Justified in Withdrawing the Case from the Jury, and the Supreme Court Erred in not Reversing for that Reason.

POINT XIV.

The case should not have been withdrawn from the jury unless the conclusion followed as matter of law that no verdict, either whole or in part, favorable to the defendant, Ankeny, could be rendered upon any view which could be properly taken of the facts the evidence tended to establish.

Phœnix Ins. Co. *v.* Doster, 106 U. S., 30;
Randall *v.* Baltimore & Ohio R. R. Co., 109 U. S., 478;
Goodlet *v.* Louisville, etc., R. R. Co., 122 U. S., 411;
Kane *v.* Northern Central Railway, 128 U. S., 94;
Jones *v.* East Tenn., Vir. & Geo. R. R., *Id.*, U. S., 443;
Texas Pac. Railway Co. *v.* Cox, 145 U. S., 606.

The following questions of fact should have been submitted to the jury under the direction of the court, provided it were at all proper to permit a trial on the issues tendered by the reply of plaintiff:

1st. Did or did not the plaintiff pay the mortgage debt of $3,000 when and as due, or at all?

2d. Was there a foreclosure suit to recover said $3,000, and a judicial sale of the bonds included in the bond for deed?

3d. Did plaintiff, Clark, by his acts and declarations to the effect that he would not accept a quit-claim deed relieve defendant, Ankeny, from making a formal tender of the same?

4th. Did defendant, Ankeny, make a formal tender of such deed as his bond obligated him to make; and

5th. The court should either have charged the jury that the facts contained in the stipulation of the parties filed in the case and offered in evidence were such as vested in defendant, Ankeny, on October 20, 1882, a legal title to the lands lying in section 19, or otherwise should have submitted to the jury that question under a proper charge.

Plaintiff Clark should have Cancelled the Bond or Reconveyed to Ankeny his Interest in the Land when he Surrendered Possession.

Point XV.

But, again, the bond for a deed given by Ankeny to Clark, the same having been made a matter of record, vested in Clark an equitable interest in the land, which he was obligated to reconvey to Ankeny, or at least he was obliged to cancel his bond of record before he could be said to have placed Ankeny *in statu quo* and before he could institute a suit to recover back the purchase money.

14 Cal., 60;
Pomeroy's Remedial Rights, 126;
1 Black (U. S.), 450;
5 Barb., 323;
Dial *v.* Crain, 10 Tex., 444.

Attention is directed to section 2311 of the code of Washington, 1881, which is as follows:

"Sec. 2311. All conveyances of real estate or of any interest therein and all contracts creating or evidencing any incumbrance upon real estate shall be by deed."

The effect of this is that if the bond in question did vest any interest in the land in Mr. Clark, he could only divest himself thereof in the manner provided by said section.

The court below virtually conceded the proposition just stated by modifying the judgment of the District Court so far as to suspend the issuance of execution until the defendant in error, in the words of the opinion of the court, "execute a proper and sufficient release or cancellation of the bond mentioned in this case and deposit such release or cancellation with the clerk of the District Court for the use of the plaintiff in error." (Record, 36.)

It is submitted this was error. The Supreme Court should have held that the execution of such release was a condition precedent to be performed by Clark before his right to bring suit attached.

In conclusion, it is respectfully submitted that whatever view may be taken of this case there is no possible escape from the conclusion that there is in this record manifest error materially affecting the substantial rights of the plaintiff in error, and a reversal should be ordered.

JOHN H. MITCHELL,
Attorney for Plaintiff in Error.

148 US 345

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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

LEVI ANKENY, PLAINTIFF IN ERROR,
v.
VAN BUREN CLARK.

No. 64.

In Error to the Supreme Court of the late Territory of Washington.

BRIEF FOR DEFENDANT IN ERROR.

JOHN B. ALLEN,
Attorney for Defendant in Error.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS
1892.

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Statement of the Case.

PLEADINGS AND PROCEDURE.

The pleadings are set forth at length in the record and in the brief of plaintiff in error, but briefly stated they are as follows:

The defendant in error pleads in assumpsit a reasonable price for a quantity of wheat sold and delivered to the plaintiff in error.

The plaintiff in error makes a general denial of the complaint, and, by way of an affirmative defence, states it is true he did obtain the wheat from defendant in error, but that defendant in error had given plaintiff in error a wheat-note, secured by a chattel mortgage on the grain grown on a certain described tract of land, and that the grain named in the complaint was the same grain, and that it had been delivered and received in payment of the note.

The defendant in error, by way of reply, said it was true he had given the note and mortgage, but that both were given as collateral security for the fulfilment of another contract, which was to the effect that plaintiff in error had entered into a bond to sell to defendant in error, for the price of 12,000 bushels of wheat, the land in the answer described, and upon payment of the wheat deliver to defendant in error a good and sufficient deed of conveyance; that defendant in error had delivered the wheat agreeably to the contract, and otherwise complied with its terms; that plaintiff in error had neglected and refused to deliver any good or sufficient deed of the land and was without title to half the land; that defendant in error, after being refused a conveyance, had notified plaintiff in error he should relinquish the possession of the land and rescind the contract; that he had gone out, had rescinded the contract, and tendered possession to plaintiff in error, and upon this state of facts demanded judgment for the reasonable price of the wheat, according to the allegation and prayer of the complaint.

Service of the reply was accepted May 7th and the same was filed May 9th.

Record, p. 8.

No objection was taken to the pleadings of the defendant in error either by motion or demurrer.

November 3, 1887, after the issues had been formed, the following order was entered in the case:

"Now, therefore, by stipulation and agreement of the parties in open court, it is ordered that this cause be, and is hereby, transferred to the district of the fourth judicial district holding terms at Sprague."

Record, p. 10.

November 11th the parties made a written stipulation and agreement of the principal facts in the case to be admitted as such without proof.

See Record, pp. 16–17.

And upon November 12th procured a jury to be empaneled to try the issues thus joined.

Record, p. 12.

STATEMENT OF THE EVIDENCE.

The evidence consisted of the following stipulation of facts:

In the District Court of the Fourth Judicial District of Washington Territory, Holding Terms at Sprague.

V. B. CLARK, Plaintiff,
v.
LEVI ANKENY, Defendant.

It is hereby stipulated and agreed by and between the parties to the above-entitled action that the following are facts in the above-entitled action and are admitted as such without proof:

1. That that certain map of definite location hereto attached, marked "Ex. A," by agreement, and that certain map hereto attached, marked "Ex. B," by agreement, together with the accompanying letters thereto attached, were rec'd and placed on file in the United States Land Office at the times they and each of them purport to have been received and filed and are the copies they respectively purport to be.

2. That the main line of the Northern Pacific Railroad Company was constructed and completed in the year 1880, on the route and line indicated and laid down on the aforesaid maps, to Wallula, and after examination and report by commissioners, as provided in the act of Congress, duly appointed for said purpose, "said road was accepted by the President of the United States, as provided in said act."

3. That on May 30, 1881, the Northern Pacific Railroad Company duly made, executed, and delivered to Peter Huff a warranty deed for the northeast quarter of section 19, township 8 north, range 37 east.

4. That on December 13th, 1881, the said Peter Huff, together with his wife, duly made, executed, and delivered to the defendant a warranty deed for the said northeast quarter of said section 19.

5. Plaintiff delivered to defendant the following wheat at the following dates, to wit: 4,167 bushels December, 1883, and 8,600 bushels September, 1885; and said wheat was delivered by plaintiff to defendant and accepted by def't in pursuance of the terms of the bond set out in plaintiff's reply and as the purchase price of said land in said bond described; that 767 bushels of said wheat was, after the delivery, ascertained to be in excess of the amount called for by the terms of said contract, and that the value of all of said wheat was and is fifty cents per bushel.

6. That defendant delivered to plaintiff the possession of the land described in said bond on the date of said bond.

7. That on November 16th, 1886, plaintiff served on defendant a notice, which is hereto attached, marked "Ex. C," and within ten days thereafter quit possession of said land, and then notified defendant he had rescinded the contract and had quit the possession of said land, and tendered defendant possession thereof.

8. That the rental value of the land described in contract during the time the same was in possession of defendant under said contract was twenty-one hundred and twenty-seven dollars.

No objection is made to the competency of the foregoing stipulated facts, but each party reserves the right at any and all times to object to any and all thereof, upon the ground that the same or any thereof are irrelevant or immaterial.

Notwithstanding this stipulation, either party may offer such evidence as they or either of them may see fit, not inconsistent with said stipulation.

Dated November 11th, 1887.

E. K. HANNA AND
ALLEN, THOMPSON & CROWLEY,
Attorneys for Plaintiff.
B. L. & J. L. SHARPSTEIN,
RUFUS MALLERY, AND
BRENTS, ANDERS & CLARK,
Attorneys for Defendant.

Endorsed: Clark *vs.* Ankeny. " Stipulation of facts."

(Copy.)

" Ex. C."

Office of G. T. Thompson, attorney-at-law, over Baker & Boyer's bank.

WALLA WALLA, W. T., *Nov.* 16, 1886.

Levi Ankeny, Esq., Walla Walla, W. T.

DEAR SIR: I have performed my part of the contract in the purchase of the land described in your bond to me. I have learned that you have no title to one hundred and sixty acres of it. You have refused to give me anything more than a quitclaim deed to this part of the land. I cannot accept such a deed. It was not what the contract called for. Unless within five days from this date you convey a perfect title to me to the whole of the land described in the bond, by a good and sufficient conveyance, I will at the end of that time abandon this land and surrender the possession to you and look to you for such compensation as the law allows me on account of your violation of the contract.

Resp't,

V. P. CLARK.

Endorsed: "Exhibit C."

Bond.

Levi Ankeny to Van Buren Clark.

Know all men by these presents that I, Levi Ankeny, am held and firmly bound unto Van Buren Clark in the penal sum of $10,000.00; for the payment of which sum, well and truly to be made, I bind myself, my heirs and executors, firmly by these presents.

Sealed with my seal and dated this 20th day of October, A. D. 1882.

The conditions of the above obligation are such that whereas the above obligor has sold and agreed to convey to the above obligee the following-described real estate in Walla Walla county, Washington Territory, to wit, the northeast quarter of section 19, and the northwest quarter of section 20, in township eight north, of range 37 east, of the Willamette meridian, subject to a mortgage for $3,000.00, and interest thereon from Sept. 1st, 1882, which said Clark is to pay when and as due on the payment by the obligee to the obligor of twelve thousand bushels of wheat according to the terms of a certain wheat note, of even date herewith, made by obligee to obligor: Now, therefore, if the said obligor shall, upon the payment of said wheat note, convey said premises to the obligee, his heirs or assigns (subject to said mortgage for $3,000.00), then this obligation to be void; otherwise to be and remain in full force; said payment, however, to be a condition precedent, and a failure to make any payment at the time or in the manner specified in said note shall discharge the said obligor from all obligation to convey the said premises, and the obligor may immediately take possession of said premises, and all crops raised on said premises shall be owned and held by the obligor each year until the payment specified in said note for said year has been fully made.

LEVI ANKENY. [SEAL.]

In presence of—
Wm. Stine.
B. L. Sharpstein.

The map marked "Exhibit A," showing the land to be within the "forty-mile limit definite location," was accompanied by the following letter:

(Copy.) ("F.")

Department of the Interior,
General Land Office,
Washington, D. C., *Nov.* 17, 1880.

Register & receiver, Walla Walla, Washington Ty.

Gentlemen: The Northern Pacific Railroad Company, under the act of July 2, 1864, has filed a map of definite location of its line of route from a point near Wallula, in the Territory of Washington, to a point near Spokane Falls, in said Territory. The said map was received in this office from the Secretary of the Interior, with referred letter from George Gray, general counsel for said railroad company, dated the 1st ulto., on the 4th ultimo, on which last-named date, by the terms of the grant, the right of the company attached to the odd sections in the "granted" or forty-mile limits, according to the definite location.

I enclose herewith a diagram showing the line of road as definitely located, the corresponding forty-mile limits designated by blue lines and the fifty-mile limits designated by vermilion lines.

The diagram also shows the former withdrawals ordered by letter of March 30, 1872, for the main line, and the letter of July 3, 1879, for the branch line. The former, on the line of general route within the limit of forty miles, designated by a brown (green) line. The said withdrawals of 1872 and 1879 will remain effective as heretofore, except as hereinafter set forth.

The only effect of this adjustment as to lands in your district is as follows:

The even-numbered sections to the east of the road and lying between the blue line marked "40-mile limits" and the vermilion line marked "50-mile limit," heretofore held at double the minimum price, you will now reduce to minimum ($1.25 per acre) under the pre-emption laws.

The odd-numbered sections lying between the vermilion line marked "50-mile limit" and the brown line marked "40-mile limit (temporarily)," heretofore withdrawn, you will restore to entry at the minimum rate, and the even-numbered sections in the same limit will also be subject to pre-emption at the minimum rate.

Under the act of March 3, 1879, homesteads on the reserved even-numbered sections will be permitted to the full extent of 160 acres, irrespective of the limits in which the lands entered may be situated.

In order to carry the above restoration into effect you will cause a notice to be published in the newspaper having the largest circulation in your district that upon a day to be fixed by you, and not less than thirty days from date of notice, the lands to be restored will again become subject to pre-emption and homestead entry. This notice will be published and paid for in the usual manner, and when published send copy to this office.

Please acknowledge the receipt of letter and diagram.

Very respectfully,
(Signed) J. A. WILLIAMSON,
Commissioner.

That marked "Exhibit B" shows the land to be beyond the "forty-mile limit definite location," and was accompanied by the following letter:

(Copy.)
"F."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Aug.* 16, 1881.

Register and receiver, Walla Walla, Washington Territory.

GENTLEMEN: Referring to office letter "F," of Nov. 17, 1880, transmitting diagram showing withdrawal of lands on definite location of the Northern Pacific railroad from a point near Walla Walla, Washington Territory, to a point near Spokane Falls, in said Territory, I transmit herewith a diagram on which is marked a yellow line for the 40-mile limits and a pink line for the additional 10 miles or "indemnity" limits, beyond which line said railroad company will not be entitled to select lands on construction of its roads to the point to which it is definitely located, as shown by said diagram.

The withdrawal heretofore ordered will not be affected in any manner by this action, the intention being merely to call your attention to the fact that the company will not be entitled to select land beyond the designated line.

Respectfully,
N. C. McFARLAND,
Commissioner.

V. B. CLARK, a witness produced by the plaintiff, testified substantially as follows:

My name is Van Buren Clark. I am the plaintiff. I know the defendant, Levi Ankney. I entered into a contract with him for the purchase of land—the same land mentioned in the bond in this case, which the witness identified and referred to. After I had delivered all the wheat called for by the bond I went to Mr. Ankeny's bank and told him that, having complied with the contract on my part, I wished him to deliver me a deed for the land, as agreed upon. He said, "All right;" to come in the following Saturday and I should have it. I went to his bank at that time and saw him, but the deed was not given me. I called the third time upon Mr. Ankeny at the bank—this was some time later—and told him I had fulfilled the contract upon my part and wanted him to make me out the deed, or, if he did not do that, to pay me for my wheat. He said to me, "Clark, you have bothered me enough about this matter; I don't want to be bothered by you any more about it." I then turned and left the bank. Some time after this I again went to the bank in company with Milton Aldrich, and Ankeny told me that I was owing notes to the bank, of which he was president, and when I paid up those notes he would make me a deed to the land. I told him I could not pay the notes until I had a title to the land, so that I might be able to borrow money upon it; that the notes were all right, and when I could raise money I would pay them. He told me to see his attorneys, Mess. B. L. & J. L. Sharpstein. I met Mr. B. L. Sharpstein, who said I could have the deed when I paid my notes at the bank. He afterwards told me I could have a deed—that is, a warranty deed—to the land in section 20 and a quitclaim deed to the land in — 19, and if I was called upon to use my land right under the land laws of the United States to get the title to the land in — 19 I could have pay for what I should pay out in this way; but no arrangement of this kind was ever agreed upon. I recollect being in Sharpstein's office on other business after this and before the action was commenced, but do not think a deed was offered me there at all. I am quite sure that it was not, but if it had been offered me I should have recollected it. I never got a deed of any kind; I never saw any deed. A few days after November 16, 1886, the date on which I gave Mr. Ankeny the written notice which was mentioned in the stipulation, a copy of which is in evidence. marked "Ex. C," I went to the bank, taking Mr. Stanfield, a neighbor, along as a witness with me, and told Mr. Ankeny that I surrendered the land in the bond described back to him and quit the possession of it. He said, "All right." This was about all the talk. Ankeny turned to some other matter, and we went out of the bank. At the time I entered into the bond for the purchase of the land I did not know that any part of it was railroad land. I was a stranger in the country at the time and knew nothing about railroad land, and did not learn until about two months afterwards that any portion of it was.

William Stanfield, being sworn as a witness of plaintiff, testified substantially as follows:

My name is William Stanfield. I am a farmer. I live in Walla Walla county, and know the parties to this action. I went along with the plaintiff when he went to the bank of Ankeny, in November, 1886, and heard the conversation between plaintiff and defendant. Mr. Clark asked me to go along as a witness. Plaintiff said to Ankeny he surrendered the possession of the land back to him and that he went out of the possession of it. Ankeny said, "All right," and that is about all that was said between them.

MILTON ALDRICH, being sworn as a witness for plaintiff, testified substantially as follows:

I have known the parties to this action for some time. I was in Ankeny's bank prior to November 16, 1886, and heard something of a conversation between plaintiff and defendant. Plaintiff asked defendant to give him a deed for the land. Defendant asked plaintiff about paying some notes he owed to the bank, and plaintiff said he would settle them when he got his deed to the land. Defendant told plaintiff to go to Messrs. Sharpsteins, his attorneys, about the deeds. This is about so much of the conversation as I heard.

Plaintiff rested.

Thereupon defendant moved the court for a judgment of non-suit, which motion was overruled and denied by the court; to which ruling of the court defendant duly excepted, and the exception was allowed by the court. Defendant then read all of said stipulation of facts except subdivisions 5, 7, and 8. Defendant offered to read in evidence subdivision No. 8 of the aforesaid stipulation of facts; to the reading of which plaintiff objected; which objection was sustained by the court; to which ruling defendant duly excepted and said exception was allowed by the court. Defendant offered to prove the rental value and the value and use of the occupation of said land in said bond described during the time the same was occupied by plaintiff under said contract; to all of which offered evidence the plaintiff objected, and the said objecas a homesteader or pre-emptor, if he had to use one of them to perfect title. I asked him what price he would place on his right. He said he could not tell. Nothing further was ever done about this proposition. Afterwards plaintiff informed he would not accept such a deed as I mentioned. I never told plaintiff he could not have a deed without paying his notes in the bank.

Plaintiff, being recalled, testified that he was in Sharpstein's office in regard to a matter not connected with this case, and did not recollect the conversation testified to by John L. Sharpstein in regard to having a deed, and thinks he would recollect it if it had occurred; that he saw no deed on that occasion, nor was any deed shown him or pointed out to him or offered to him on that occasion, according to his best recollection.

E. K. Hanna, being called as a witness in rebuttal for plaintiff, testified in substance—

That he was one of the attorneys for plaintiff, and had been the law partner of W. G. Langford, and the firm had been plaintiff's attorneys in this action; that he had heard conversations in the office between B. L. Sharpstein and his law partner, Judge Langford, in relation to this matter, but did not recollect of either plaintiff or Judge Langford for him saying that plaintiff would not accept any other than a warranty deed. I was in the office at a number of conversations between Judge Langford and B. L. Sharpstein, we acting for plaintiff and he for defendant. I could not say that I was present at all of the conversations, but in none of them where the deed was spoken of did I hear plaintiff or any one for him say that he would not accept any other than a warranty deed.

Rescission of Contract and Pleading at the Common Law.

Where a contract has been entered into and one of the parties to it performs by making payment and the other refuses to perform, the party free from fault may restore the other to his former situation and rescind the contract. The effect is, as the word imports, to recall or revoke the contract, leaving the party without fault to recover on the implied obligation that exists in his favor, which in the case at bar is the fact of plaintiff in error having acquired the wheat of defendant in error, with the consequent legal obligation of undertaking to pay a reasonable price for it. This at common law is recovered under the common count in assumpsit.

2 Hilliard on Vendors, 61.
Thompson *v.* Gould, 20 Pickering, 134.
Eames *v.* Savage, 14 Massachusetts, 425.
Baston *v.* Clifford, 68 Illinois, 64.
Stahelin *v.* Sowle, 87 Michigan, 134.
Gwynne *v.* Ramsey, 92 Indiana. 414.

From the case of Baston *v.* Clifford (68 Ill.) the following quotation is made :

> "In Bannister *v.* Read (1 Gilm. 99) this court, speaking of the doctrine of rescission and recovering back money paid on the contract, says : 'Although one party to a contract may not alone rescind it, he may, nevertheless, by neglecting or refusing to perform it on his part, place it in the power of the other party, where he is not also derelict, to avoid it, or not, at his pleasure. The breach of one party may, in such case, be treated by the other as an abandonment of the contract, authorizing him, if he chooses to do so, to disaffirm it ; and thus the assent of both parties to the rescission of the contract is sufficiently manifested—that of the one by his neglect or refusal to perform his part of the contract, and of the other by his suing, not for such breach, but for the value of any act done or payment made by him under the contract, as if it had never existed.'
>
> "See also Webster *v.* Enfield, 5 Gilm. 298."

P. 70.

Also the following quotation from—
Gwyne *v*. Ramsey, 92 Indiana, 414.

"Doubtless it is true, as a general proposition, that a contract can only be rescinded by the common consent of all the parties thereto. One party can no more rescind than one party can make a valid and binding contract between two or more parties. But the vendor of real estate who stipulates in his contract that the vendee shall have and hold the possession of such real estate, and puts him in possession thereof, and thereafter ousts him from such possession, and resumes and holds the possession as against his vendee, thereby evinces his intention to rescind such contract. If thereupon the vendee acquiesces in these acts of the vendor as indicative of his intention to rescind the contract, and brings an action to recover his damages occasioned by such rescission, it may well be said, we think, that both parties concur in and consent to the recission. We know of no reason why the mutual consent of the parties to the rescission of the contract may not be shown by their acts as conclusively and satisfactorily as by evidence tending to prove an express rescission. When the rescission is shown either by express agreement or by the acts of the parties clearly indicative thereof, an action will lie to recover whatever may have been paid or delivered, or the value thereof, on account of such rescinded contract.

"Fowler *v*. Johnson, 19 Ind. 207.
"Dantzeiser *v*. Cook, 40 Ind. 65.
"Dotson *v*. Bailey, 76 Ind. 434."
P. 418.

In the case of Stahelin *v*. Sowle (87th Michigan Reports, at page 134), Champlin, C. J., states and supports the right of rescission on the part of the party not in fault, as follows:

"Where one party has departed from a special contract for the delivery of specific articles from each to the other, the other party may treat it as rescinded; and if, by the terms of the contract, concurrent acts are to be performed, as the delivery of property by one party and the payment of price by the other, if either party should refuse to perform his part of the contract the other may treat the contract as abandoned, and justify rescission under it.

" Fletcher *v.* Cole, 23 Vt. 114.
" Goodrich *v.* Lafflin, 1 Pick. 57.
" Dubois *v.* Canal Co., 4 Wend. 285.
" Hall *v.* Rupley, 10 Penn. St. 231.
" Moulton *v.* Trask, 9 Metc. 577.
" Derby *v.* Johnson, 21 Vt. 17.
" Hoagland *v.* Moore, 2 Blackf. 167.
" Goodman *v.* Pocock, 15 Adol. & E. (N. S.) 576.
" Webster *v.* Enfield, 5 Gilman, 298.
" Webb *v.* Stone, 24 N. H. 288."

THE CODE SANCTIONS COMMON-LAW METHOD OF PLEADING.

Defendant in error insists the modern code adopts the same system of pleading.

There was imported in the original special contract a further or implied contract, which was to the effect that if the vendee complied with its terms in making payment of the purchase price of the land, stipulated for in the bond and evidenced by the note and chattel mortgage, and the vendor should refuse or be unable to convey the land as he had agreed to, then he consented that the original contract might, at the election of the vendee, be abrogated and the latter might recover the value of the wheat.

This latter obligation should be pleaded directly, as at common law, instead of pleading the facts and circumstances by means of which it was created.

This rule was adopted by the supreme court of the Territory of Washington, in 1880, in the case of the Seattle and Walla Walla Railroad Company *v.* Ah Kow *et al.* (2 Washington Territory), and given legislative recognition by the subsequent re-enactment of the Civil Code.

See Code of Washington, 1881.

Greene, C. J., in rendering the opinion in the case of Ah Kow *v.* Seattle and Walla Walla Railroad Company (2 Washington Ter. 40), said:

> "The appellees filed their complaint below to enforce labor liens, and after decree in their favor are brought here on appeal. Hasty reading of their complaint might impress one that under our code system of pleading it does not sufficiently set out the fact of indebtedness, and on this ground it is assailed by the defendant. Evidently it was modeled on a common-law count of *indebitatis assumpsit*, and we do not doubt its allegations would have stood good as such a count at common law. Enough appears in it, we think, to support proof of either a special or implied assumpsit.
>
> "A court might in its discretion, upon motion to make such a complaint more definite and certain, allow the motion, especially if peculiar facts were shown rendering it likely that justice would be thereby promoted. Refusal, however, would be no ground to make the action of an appellate tribunal unless there was a plain abuse of discretion. The facts, as we gather them from the pleadings and proofs, show labor of such a description as would entitle to liens, etc."

Pp. 190 and 191.

Chief-Justice Burke, in following the rule in this case, after quoting the pleadings, proceeds:

> "We feel no hesitation in holding that the theory upon which plaintiff brought this action was the correct one. Under the old system of pleadings, an action in assumpsit would lie to recover back purchase-money paid upon a contract of sale which had been rescinded.
>
> "2 Hilliard on Vendors, 61, 62.
> "Elliot *v.* Edwards, 3 B. & P. 181.
> "Eames *v.* Savage, 14 Mass. 425.
> "Newsome *v.* Graham, 10 B. & C. 234.

"The same rule of pleading prevails in like cases under the code, and there is no good reason why it should not. When a contract is rescinded it is abrogated and annulled, it is as if it had never existed, and the party seeking to recover back money paid under it proceeds, not upon the contract, for there is none, but upon the implied obligation that exists on the part of the one who received money under it to pay it back to the one from whom he received it.

" Farron *v.* Sherwood, 17 N. Y. 227.
" McManus *v.* Opher Silver Mining Co. 4 Nev. 15.
" Wilkins *v.* Stege, 22 Cal. 231.
" Ah Kou *et al.* *v.* Seattle, etc., R.R. Co., 2 Wash. Ty. 40.

" The reply in this case is neither inconsistent with nor a departure from the complaint. It is a proper replication to the new matter set up in the answer."

In view of these cases and the universality of the rule in the code States, we submit the contrary and exceptional decision since adopted by the supreme court of the State of Washington should not be given a retroactive effect. The following quotations are selected from the text-books and numerous opinions upholding the general doctrine.

In the second edition of Bliss on Code Pleading, the right is recognized in the party without fault, of treating the contract as rescinded, and proceeding in assumpsit as at common law.

The author says:

"The common-law rule is that, when an agreement has been wholly performed on the part of the plaintiff, or when he has been hindered from performing it by the defendant, he may recover under the common counts if they cover the subject-matter of the agreement on his part. There is reason for holding that if the plaintiff has been hindered from performing the contract, he may, if it was for work and labor, sue for what he has done, without naming the contract, for the reason that the other party has repudiated it, and he has a right to treat it as rescinded.

"But when it has been fulfilled the plaintiff can only recover under and by virtue of the contract. The courts administering the code do not, however, require the pleader to rely upon the agreement, but hold the common law to be still in force."

In sections 542–544, second edition of his work on "Remedies and Remedial Rights," Mr. Pomeroy, in treating of the question whether a complaint substantially in form with the old common or general count in assumpsit is in accordance with the fundamental principles of the modern code and to be regarded as good pleading, says :

"The courts have almost unanimously answered this question in the affirmative, and have held that such complaints or petitions sufficiently set forth a cause of action in the cases where the declarations which they imitate would have been proper under the former practice. Notwithstanding the imposing array of judicial authority shown by the citations in the foot-note, the courts of one or two States have refused to follow this course of decision, and have pronounced such forms of complaint or petition to be in direct conflict with the correct principles of pleading established by the codes. Although these few cases cannot be regarded as shaking or as throwing any doubt upon the rule so firmly established in most of the States, they may be properly cited in order that all the light possible may be thrown upon this particular question of interpretation.

"Not only have the courts in this manner sanctioned the use of the common counts as appropriate modes of setting forth the plaintiff's cause of action, they have also held that another rule of the old practice is still retained by the codes.

"The rule thus declared to be in force is the following : When the plaintiff has entered into an express contract with the defendant, and has fully performed on his part, so that nothing remains unexecuted but the defendant's obligation to pay, he may, if he please, sue upon the defendant's implied promise to make such payment, rather than upon the express undertaking of the original contract; and to that end he may resort to a complaint or petition identical with the ancient common counts; except, as has already been shown, the averment of a promise may, and according to the better opinion should, be omitted. This doctrine is supported by numerous decisions in various States, and it seems to be regarded as still operative in all the circumstances to which it was applicable under the former system.

"In the face of this overwhelming array of authority, it may seem almost presumptuous even to suggest a doubt as to the correctness of the conclusions that have been reached with so much unanimity."

Strong, J., in Farron *v.* Sherwood (17 New York Reports, pp. 229–30), says:

"The first point made by the counsel for the appellant is that, for the portion of the work and labor done under the special contract, the remedy of the plaintiff was upon that contract, and that he was not entitled to recover upon the common counts. * * * It was not objected at the trial that the contract had not been fully performed on the part of the plaintiff; no question was raised, and, so far as appears, there was no ground for any question on that subject. Hence it must be deemed that the plaintiff had done all that was incumbent on him to do, and that nothing remained to be done by the contract but the payment of the stipulated price by the defendant. The case is, therefore, within the well-settled rule that where there is a special agreement and the plaintiff has performed on his part, the law raises a duty on the part of the defendant to pay the price agreed upon, and the plaintiff may count either on this implied assumpsit or on the express agreement. A new cause of action upon such performance arises from this legal duty, in like manner as if the act done had been done upon a general request without an express agreement.

"Lawes' Pl. 5.
"Jewell *v.* Schroeppel, Cow. 564.
"Feeter *v.* Heath, 11 Wend. 484.
"Mead *v.* Degolyer, 16 *id.* 637, 638.
"Clark *v.* Fairchild, 22 *id.* 576.

"This rule is not affected by the code; the plaintiff might, as he has done, rest his action on the legal duty; and his complaint is adapted to and contains every necessary element of that cause of action. It was not necessary to state in terms a promise to pay; it was sufficient to state facts showing the duty from which the law implies a promise; that complies with the requirement that facts must be stated constituting the cause of action.

"Allen *v.* Patterson, 3 Seld. 476.

"The defendant was not precluded by the form of the complaint from setting up and availing himself of any defence he had under the contract.".

Cole, J., in Grannis *v.* Hooker (29th Wisconsin, pp. 66–67):

"The question arising in this case is really whether the complaint states a cause of action. The complaint contains what under the former system of pleading would be called a count for money had and received. On the trial, the attorney of the plaintiff made a statement of facts to the court and the jury out of which the action arose, and then proceeded to support the issue on the part of the plaintiff by calling and having sworn a witness.

"Whereupon the defendant objected to any evidence being given under the complaint on the ground that it did not state facts sufficient to constitute a cause of action. This objection was sustained. The case therefore stands in the same attitude that it would on a general demurrer to the complaint.

"We are inclined to hold the complaint sufficient on demurrer. According to the statement made in his opening by the plaintiff's counsel, the defendant procured the money sued for by means of fraud in an oil-land speculation. It is claimed by the defendant that all the facts in respect to the alleged fraud should have been distinctly stated in the complaint, otherwise the plaintiff is not entitled to prove them. On the other hand, it is claimed that all it is necessary the complaint should contain is substantially an allegation that the defendant has received a certain amount of money to the use of the plaintiff, as in the old form of a declaration in *indebitatis assumpsit.* We are inclined to sanction this latter view, and to hold that the facts which, in the judgment of the law, create the indebtedness or liability need not be set forth in the complaint. If the complaint does not state with sufficient certainty the facts in respect to the defendant's obtaining the money from the plaintiff, the better practice is to move to have the pleading made more definite and certain." * * *

Middleport Woolen Mills Company *v.* Titus (35th Ohio State Reports, page 253), upon the following pleadings the court stated the law:

"The plaintiff says that the defendant was, on the first day of January, 1871, indebted to the plaintiff in the sum of ten thousand dollars for so much money at divers times before that time had and received by the defendant to and for the use of the plaintiff, and which sum of money was then due and payable; yet the defendant has not paid the same or any part thereof to the plaintiff, although often requested so to do; whereupon the plaintiff prays for judgment against the defendant for said sum of ten thousand dollars, together with interest thereon from, etc.

"The company, by its answer, admitted the receipt of ten thousand dollars from Titus during the year 1870, but alleged, among other things, that he paid the money for shares to that amount in the capital stock of the company, under a contract in writing made January 21, 1870; and that it performed all the stipulations of its contract, and was at all times ready, able, and willing to deliver to Titus its capital stock to the amount of $10,000, and did tender and offer to so deliver the same, and is now ready, able, and willing to so tender and deliver said stock, being stock representing part of the original stock of the company, of all which Titus had notice.

"Titus, in his reply, denied all averments in that part of the answer set forth, except that he signed the agreement therein referred to, and paid to the company $10,000 under the same."

* * * "By the code of civil procedure, in which the common-law forms of pleading were abolished, the petition, answer, and reply must contain facts concisely stated. If, as is sometimes the case, a cause of action may be properly set forth in a petition in substantially the same form as in a declaration, it is not because of the sufficiency of the pleading under the former system, but for the reason that its language is in accordance with the facts in the particular case. In this case the petition is, substantially, in the form of a count in a declaration in assumpsit or debt for money had and received. If the contract between Titus and the company is subsisting it is quite clear there can be no recovery upon this petition, for it cannot be regarded as founded on the written contract.

"Swan's Pl. and Pr. 57.

"And see Bliss on Pl., § 156 *et seq.*

"But if the contract has been terminated, and the only thing that remains to be done is for the company to pay and Titus to receive $10,000, with interest, there can be no objection to a recovery under this petition."

Jones *v.* Mial, 82 North Carolina, 252:

"As to the first point: It is our opinion that the plaintiff had the right to maintain his action and succeed therein on the common counts in assumpsit. It is well settled upon authority and reason that, in case of a contract with dependent stipulations, so long as the same are in force a party must recover on it if at all, and no action in general assumpsit as upon a quantum meruit will lie for anything done under it. But if the contract is put an end to by mutual consent, or one of the parties has done some act inconsistent with his duty to the other, preventing or disabling him to go on in the performance of his engagements, the party not in fault may hold the special contract as abandoned or rescinded and at once proceed in general assumpsit upon a liability implied by the law for remuneration for what he may have done under the contract.

" Winstead *v.* Reid, Busb. 76.
" White *v.* Brown, 2 Jones, 403.
" See also Am. Ed., 2 Smith's Leading Cases, Notes to Cutter *v.* Powell."
Page 255.

DEPARTURE IN PLEADING.

The reply is neither inconsistent with nor a departure from the complaint. It is a proper response to the new matter set up in the answer. Plaintiff in error is not in a situation to complain because he introduced into the case the matter he claims to be a departure and called upon his adversary to controvert or confess and avoid it. His failure to move against or demur to the reply; his acquiescence by agreeing to a change of venue after the pleadings had been perfected; entering into stipulation of the principal facts of the case and going to trial, estop him from objecting to the reply on this ground.

In Bliss on Code Pleading the author says:

> "As to the proper method of correcting a departure, whether by motion or demurrer, courts are not in perfect harmony, but all agree that if the parties go to trial without raising the question judgment will not be arrested."

Second Ed. Bliss on Code Pleading, sec. 396.

Says the supreme court of Indiana, in case of New *et al.* *v.* Wambach *et al*, (42 Ind. 460):

> "In case of a departure, if, instead of demurring, the defendant takes issue upon the replication, and it be found against him, the court will not arrest the judgment."
>
> 1 Chitty Pl. 648.

The Missouri court of appeals holds the proper remedy is by motion (Philibert *v.* Burch, 4 Missouri Appeal Reports, 470):

> "The direct obligation of a principal, as set forth in the petition, constitutes a different cause of action from the contingent liability of a guarantor, which appears in the reply. This is a clear case of departure. A motion to strike out the reply would properly have been sustained. But no such motion having been filed, this defect was cured by the verdict."
>
> P. 473.

THE TITLE WAS NOT PERFECT.

The plaintiff in error having abandoned his non-suit made profert of his claim of title, which consisted of the two Land Office maps, the earlier in date of which showed the land to be within and the latter of which showed it to be beyond the "forty-mile limit definite location," with their accompanying letters; and of the facts that the road had been constructed and completed in 1880, on the route and line indicated and laid down on the maps; that it has been favorably reported on to the President by commissioners, and had been accepted by the President.

A deed from the railroad company to one Huff and from Huff to himself.

It will be observed these acts alone were presented and claimed by plaintiff in error as conferring a perfect legal title in the Northern Pacific Railroad Company, and this question the court was called upon to decide. That this was his contention is demonstrated in his complaint that the court refused his 8th instruction.

> "8. The act of Congress of July 2d, 1864, entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route;' the filing of the map of definite location under said act; the building and completion of said road under said act to Wallula; the examination of the same by the commissioners, and *exceptance* of the same by the President of the United States gave to the Northern Pacific Railroad Company a fee-simple title to all land included in limits of said grant to Wallula, to which point said road was completed;" to which ruling defendant excepted, and such exception was allowed.
>
> Record, p. 21.

It was his specific enumeration of the steps taken by this company toward a compliance with the conditions of its grant. *Expressio unius est exclusio alterius.*

He gives emphasis to this attitude before the court in his offer of a warranty deed to the other quarter section, but only a quitclaim for this.

Without the issuance of patent, without the payment of the cost of surveying, selecting, and conveying the land, and without a final determination of the Interior Department whether this tract is within or beyond the limit of the grant, a perfect title is not established.

Turner *v.* M'Donald, 76 California, 180.
Reynolds *v.* Bovel, 86 California, 542.
Haynes *v.* White, 55 California, 40.
Thompson *v.* Shoemaker, 68 Illinois, 258.
Rawle on Covenants for Title (5th ed.), section 32.
Washington and Turner *v.* Ogden, Black's Report, vol. 1, 450.

From the above citations the following quotations are made:

Justice Grier, in 1 Black, 456:

> " It is true the words of his covenant are 'that he will make a deed' to his vendees on receipt of the first instalment. But the meaning of these words in the contract requires that the deed shall convey the land, and it is not sufficient to aver his readiness to perform merely according to the letter of the contract. The performance must always be averred according to the intent of the parties. It is not sufficient to pursue the words if the intent be not performed. The legal effect of a covenant to sell is that the land shall be conveyed by a deed from one who has a good title or full power to convey a good title."
>
> P. 456.

A title to be good " should be free from litigation, palpable defects, and grave doubts; should consist of both legal and equitable titles, and should be fairly deducible of record."

Turner *v.* McDonald, 76 Cal. 180.

In the 86 Cal. (Reynolds *v.* Bovel) the court, after finding that a previous deed, purporting to convey an interest in the land, had been made to a person with whom the vendor does not connect himself, or that circumstances existed which rendered it possible for creditors of a prior owner of the land to attack a conveyance under which the vendor holds, says:

> " It seems to us under the facts of this case and the refusal of the defendant to warrant the title, the plaintiff here was warranted in considering the title imperfect and subject to grave doubts."
>
> P. 542.

In case of Haynes *v.* White (55 Cal. p. 40), the court after reciting the facts, and among others the payment of a full price, says:

> "The manifest effect of the contract and the manifest intent of all the parties to it was that in consideration of the plaintiff's money the defendants were to convey to him the title to the land; not that they should go through the idle ceremony of executing a deed 'sufficient in form' for that purpose, when they had, in fact, no title to convey."
> Thompson *v.* Shoemaker, 68 Ill. 258.

BILL IN CHANCERY.

Rebecca Thompson took of Margaret Shields a bond for conveyance of land by general warranty and with full covenants. Part cash was paid and notes for balance of purchase price were taken.

> "At the time this suit was commenced, all the notes were pass due. Now the question arises, can the complainant compel payment of these notes without first offering to convey by warranty deed and without having title in fee-simple to the land? We think not.
>
> "Before he can compel payment of the notes he must be ready, willing, and able to perform his part of the contract. The bond calls for the title in fee of the land. He is then required to make the deed and must at the same time be seized in fee of the land.
>
> "The consideration of these notes was not a warranty deed to be made on payment of the notes, but the consideration was the title to the land which was to be conveyed by the deed. If the defendant, when the trade was made, had accepted a warranty deed and taken possession of the land, it is true, as insisted by appellee, that she would not have been in a position to complain until she had been evicted. But this is a different case. She gave her notes for the payment of the money, and took a bond for the conveyance to her of the title in fee of the land. The party who gave the bond, or her assignee, cannot insist

on payment of the notes until he or she can comply with the bond by conveying the title to the land."

Tyler *v*. Young, 2 Scammon, 444.

The defendant is not required by law to accept a warranty deed and rely on the covenants therein.

"The rule of construction of such cases is sufficiently obvious. It is familiar that the general principles of the contract of sale, both in this country and in England, recognize and enforce, while it is still executory, the right of a purchaser to a title clear of defects and incumbrances. This right is one not growing out of the agreement of the parties but is given by the law, and it naturally follows that a court of equity will not decree the specific performance of a contract where the title is bad or even doubtful."

Rawle on Covenants for Title, Fifth Edition, p. 42, Sec. 32.

In an action at law to recover certain money advanced on a contract for the purchase of a lot, to be returned if the title was found not a perfect one, the supreme court of California, in the case of Turner *v*. McDonald (18 Pacific Reporter, 263), says:

"A perfect title must be one that is good and valid beyond all reasonable doubt. Whether the title in particular cases is good or not is a question which it is often difficult to determine, and one upon which lawyers and judges sometimes disagree.

"'Though the court,' it has been said, 'may entertain an opinion in favor of the title, yet if it be satisfied that that opinion may fairly and reasonably be questioned by other competent persons, it will refuse specific performance. Thus, in a case before Sir John Leach, he expressed the strong inclination of his opinion to be in favor of the title, and yet refused the relief sought by the plaintiff; and in the recent case of Pyrke *v*. Waddingham (10 Hare, 1), in which the vice-chancellor, Turner, discussed the subject now before us, he expressed an opinion in favor of the title, but nevertheless dismissed the vendor's bill with costs. Still less, of course, will the court force a title on a purchaser in opposition to the decision of another court, though it may think that decision to be wrong.

"Fry, Spec. Perf., § 579."

THE NORTHERN PACIFIC RAILROAD COMPANY HELD BUT AN EQUITABLE INTEREST IN THIS LAND.

If it should be admitted the land in dispute lies within the limits of the grant of the Railroad Company, the evidence establishes but an equitable title.

Railway Company *v.* Prescott, 16 Wallace, 60.
Railway Company *v.* McShane, 22 Wallace, 462.
Northern Pacific Railroad Company *v.* Trail County, 115 United States Reports, 262.

In the first of these cases by which the Company evaded the payment of taxes upon its lands because of want of title, Miller, *J.*, said:

> "Two important acts remain to be done, the failure to do which may wholly defeat the right of the company to a patent for these lands. The first is the payment of the costs of surveying. It is admitted that this has never been done in the present case. If the company have such an interest in these lands that they can be sold by the State under her power of taxation, then the title is divested out of the Government without its consent and the right to recover the money expended in the surveys is defeated. As the Government retains the legal title until the company or some one interested in the same grant or title shall pay these expenses, the State cannot levy taxes on the land, and under such levy sell and make a title which might in any event defeat this right of the Federal Government reserved in the act by which the nchoate grant was made."

P. 608.

And in 22 Wallace (Railway Company *v.* McShane, 444) the same judge said:

> "The act of 1884, section twenty-one, declares that before any of the lands granted by this act shall be conveyed to the company there shall first be paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same.
>
> "That the payment of these costs of surveying the land is a condition precedent to the right to receive title from the Government can admit of no doubt. Until this is done, the equitable title of the company is incomplete. There remains a payment to be made to perfect it. There is something to be done, without which the company is not entitled to a patent. The case clearly is not within the rule which authorizes State taxation of lands, the title of which is in the United States.
>
> "The reason of this rule is also fully applicable to this case. The United States retains the legal title by withholding the patent for the purpose of securing the payment of these expenses, and it cannot be permitted to the States to defeat or embarrass this right by a sale of the lands for taxes."

In an act of Congress, in 1870, for the survey of lands within the limit of the grant of the company, among other things, the following proviso was added:

> "That before any land granted to said company by the United States shall be conveyed to any party entitled thereto under any of the acts incorporating or relating to said company, there shall first be paid into the Treasury of the United States the cost of surveying, selecting and conveying the same by the said company or party in interest."
>
> 16 Stat., 305.

In the case reported in 115 United States Reports, where the title of lands of the Northern Pacific Railroad

Company was before the Court, Justice Miller expressed the opinion that, until such expenses were paid, the United States retained the legal title to the lands within the grant. He said:

"Again it is said that, since the road was built before this tax was levied and the company had earned the land, its equitable title was complete, and, according to the decisions of this Court, it was subject to taxation.

"The same point was urged in Railway Co. *v.* Prescott. But the Court said that 'this doctrine was only applicable to cases where the right to the patent is complete, the equitable title fully vested without anything more to be paid or any act to be done going to the foundation of the right.' But it added, in that case, that two important acts remained to be done, the failure to do which might wholly defeat the company's title. One of these was payment of the cost of surveying. It may be well to restate the grounds on which this decision rests.

"The United States made a magnificent grant to this company of lands equal in quantity to forty or fifty thousand square miles, an area as large as an average State of the Union. It thought proper to require of the grantee the payment of the costs of making the surveys necessary to the location and ascertainment of these lands. To secure the payment of those expenses, it decided to retain the legal title in its own hands until they were paid. The Government was, as to these costs, in the condition of a trustee in a conveyance to secure payment of money. But, if the land was liable to be sold for taxes due to State, Territorial, or county organizations, this security would be easily lost.

"No sale of land for taxes, no taxes can be assessed on any property, but by virtue of the sovereign authority in in whose jurisdiction it is done. If not assessed by direct act of the legislature itself, it must, to be valid, be done under authority of a law enacted by such a legislature. A valid sale, therefore, for taxes, being the highest exercise of sovereign power of the State, must carry the title to the property sold, and if it does not do this it is because the assessment is void.

"It follows that, if the assessment of these taxes is valid and the proceedings well conducted, the sale confers a title paramount to all others, and thereby destroys the lien of the United States for the costs of surveying these lands. If, on the other hand, the sale would not confer such a title, it is because there exists no authority to make it.

"At all events, the holder of the equitable title to these lands has a right to prevent a sale which would have the effect of impeding the United States in the assertion of the right to them until these costs are paid.

"We are aware of the use being made of this principle by the companies who, having earned the lands, neglect to pay those costs in order to prevent taxation."

Pp. 609 and 610.

A DEED OF GENERAL WARRANTY IS REQUIRED.

When one purchases land, paying a full price for it, he bargains not only for a perfect title, but for that title to be evidenced by a conveyance that commends it as sound—a deed that corresponds with vendor's undertaking that the title is perfect.

The vendor cannot meet his obligation by giving a deed that proclaims to the world his own misgivings, if not his knowledge of defects in the title he is unwilling either to make good or stand responsible for. He cannot be allowed in his conveyance to place the brand of doubt and suspicion even upon a sound title and invite litigation against his grantee. Though nothing be said in the contract, either as to title or conveyance, the law is that the purchaser contracts for a perfect title, with a deed of general warranty, and more conspicuously is this true in the newer portions of our country.

Clark *v.* Lyons, 25 Illinois, 90.

Johnson *v.* Piper, 4 Minnesota, 195.

Tavenner *v.* Barrett, 21 West Va., 680.
Hedges *v.* Kerr, 4 B. Monroe, 525.
Andrews *v.* Word, 17 B. Monroe, 520.
Faircloth *v.* Isler and Isler, 75 North Carolina, 555.
Goddin *v.* Vaughn, ex'x *et al.*, 14 Grattan, 115.
Hoback *v.* Kilgores, 26 Grattan, 440.
Dwight *v.* Cutter, 3 Michigan, 566.
Allen *v.* Hazen, 26 Michigan, 145.
Verdeman *v.* Lawson, 17 Texas, 16.
Tremain *v.* Liming, Wright's (Ohio) Reports, 645.
Rawle on Covenants for Title (5th ed.), p. 35, sec. 28.
Bank of Columbia *v.* Wagner, 1 Peter's Supreme Court, 455, 465–6.

In Tavenner *v.* Barrett (21 West Va., at page 681) the rule is thus stated:

> "The undisputed law is that, as a general rule upon an agreement for the sale of land, the vendor, though nothing be said in the contract on the subject, is considered as contracting for a general warranty."

See Rucher *v.* Lowther, 6 Leigh, 259.

The law is thus stated in 2 Th. Coke Lit. 325 n. (G. 3):

> "With respect to the persons who are bound to enter into these covenants, it may be observed, in general, that all persons who convey lands whereof they are seized to their own use are bound to enter into the usual covenants for the title of the land conveyed."

In Kentucky the same rule obtains. Marshall, *J.*, in Hedges *v.* Kerr (4 B. Monroe, p. 528), says:

> "Besides, it is clearly expressed that Hedges is to get 'title,' generally, to the land for which he is to pay.
>
> "Taking the contract then to be for the conditional sale by H. Kerr of five-sevenths of the tract, as being the

right and interest of the five heirs for whom he acts, and to provide that each, at his election, shall convey or make title to one-seventh, being his interest in the tract, we are of opinion that upon the principles of the case of Vanadah's heirs *v.* Hopkins' administrator (1 J. J. Marshall, 291-293), the conveyance of his portion to be made by each heir should contain a general warranty. In that case the court decides that a power of attorney to sell land without limitation gave authority to execute a bond for conveyance with general warranty by which the principal was bound. The decision is based upon the position that, giving the narrowest construction to the power, it authorized the execution of a bond for making 'a sufficient title' which would require a general warranty, and the further reasoning of the court goes to prove that a bond for conveyance of land or to make title thereto, without qualification, should be understood as requiring a general warranty."

In Faircloth *v.* Isler and Isler (75 North Carolina, p. 557) the same doctrine is laid down:

"When one makes a contract of sale for his own benefit there is an implication from the nature of the transaction that he will make a deed with general warranty. When a trustee makes a contract of sale, inasmuch as he is not acting for his own benefit, there is no implication that he will bind himself by a general warranty, but the implication from the nature of the transaction is that he is to give a special warranty that 'he has done no act since the title vested in him to impair or affect it.'"

Says Lee, *J.*, in Goddin *v.* Vaughn's ex'x & als (14 Grattan, p. 117):

"It may not be questioned that where a sale of real estate is made in the ordinary mode and in general terms, without any stipulation as to the character of the title which the purchaser is to get, he is entitled to demand that a clear title shall be made, and that it shall be assured to him by deed with covenants of general warranty."

And afterwards the same court in Hoback *v.* Kilgores (26 Grattan, p. 445) states the rule as follows:

"The court is further of opinion that a vendor of real estate in his own right is bound to convey the same with general warranty, unless it be otherwise agreed between the parties, and there having been no such other agreement between these parties, the vendor, Isaac Kilgore, is bound to convey the said tract of land to the vendee, Levi Hoback, with general warranty."

Cooley, *J.*, in Allen *v.* Hazen (26 Michigan Report, 145, 146), approves this doctrine:

"In Dwight *v.* Cutler (3 Mich. 566), it was held in an able opinion delivered by Douglass, *J.*, that an agreement to convey land implied an understanding to give the usual deed therefor, and that the usual deed must be understood to be a warranty deed, that is to say, a deed with covenant of general warranty. The authorities are fully collected in that case, and we do not deem it necessary to go over them again."

The following is quoted from Vardeman *v.* Lawson (17 Texas, pp. 16 and 17):

"By having given a bond for title, it is understood in this country, certainly in this State, that the vendor has contracted to make to the purchaser a good and valid legal title, with the (16) usual covenants of warranty, in the form prescribed by the statute concerning conveyances.

"Hart. Dig., p. 128 *et seq.*, arts. 169, 170.
"Patterson *v.* Goodrich, 3 Tex. 331.
"Rawle on Covenants for Title, chap. XI.

"Mr. Rawle, in concluding his view of the cases upon the question what covenants for title the purchaser has a right to expect, observes: 'There is indeed a guiding principle in the construction of all these cases. It is familiar law that the general principles of the contract of sale, both in this country and England, recognize and enforce, while it is still executory, the right of the purchaser to a title clear of defects and incumbrances. This right is not one growing out of the agreement of the parties, but which is given by law, and it naturally follows that a court of equity will not decree the specific performance of a contract where the title is bad, or even, as it has been said in modern times, where it is doubtful. Hence, when an incumbrance exists, which it was not agreed upon should enter into and form a part of the consideration, the vendor must discharge it before he can call for a completion of the sale.

"The law, then, recognizing, *prima facie*, a necessary implication of a good title in every contract for the sale of real estate, it follows that an agreement by which such a settled rule is to be disregarded should be couched in the most express terms, and as the law further recognizes the purchaser's rights to covenants for the title, it is difficult to perceive how an agreement to convey 'by a sufficient warranty deed,' or words of similar import, can weaken the agreement which the law implies from the mere relation of vendor and purchaser.

"Rawle on Cov., 566, 2d edit.

"Upon this principle, as well as usage, where there has been a sale of land and a bond for title, and there is nothing in its terms or stipulations by which a different intention is manifest, it is to be taken that a title, valid and effectual to secure the purchaser in the full, free, and uninterrupted possession and enjoyment of the land, was intended. What is meant by a bond for title is as (17) well understood in our practice respecting the sale and conveyance of lands as what is meant by a warranty deed, or a good title, or any words of like import; and where, upon the sale of lands, it appears that a bond for title has been given, without more, it is understood that the vendor has contracted that the purchaser shall have a good title, that is, a deed of conveyance, valid and effectual to pass the title in the ordinary and statutory form, containing the usual covenant of warranty. We are of opinion, therefore, that the evidence was sufficient to entitle the defendants in error to the verdict and decree rendered in their favor."

Tremain *v.* Liming (Wright's Ohio Reports, 645):

Wood, J. "The contract is for the defendant's making a good and sufficient deed for an acre of land, on receiving $60, and by the complainant, that in case he wished to sell out, the defendant should have the first refusal by paying the $60 for the soil, and at fair value for the improvements. The purchase money was paid, and a deed tendered, and refused, 1, because the defendant's wife did not unite in the conveyance; 2, because it conveyed only a life estate; 3, because there was no covenant of warranty. This deed did not conform to the contract and the complainant was not bound to recieve it."

In the case of Clark *v.* Lyons (25 Illinois, 107) the bond was for a deed to land on payment of price. The lower court decreed a conveyance with covenants of general warranty. It was assigned as error that the party should make conveyance with covenant of warranty.

Breese, J., in conclusion of the opinion, said:

"The defendant covenanted to make a sufficient conveyance of the land, and a deed with a covenant of general warranty is such a conveyance.

"The decree must be affirmed."

Rawle on Covenants for Title (fifth ed.), p. 35, sec. 28:

"But it is difficult to determine by general and precise rule what, on this side of the Atlantic, are the 'usual covenants'—that is to say, the covenants which a vendor should give and a purchaser expect—as owing to various causes the practice of conveyancing differs widely in the two countries. It is obvious that much of the practice which prevails where the state of society has long been permanent, the titles old, and to a greater or less extent carefully examined at every purchase, loses its application in a comparatively new country, and the same covenants which might satisfy a purchaser in England or Massachusetts might not satisfy a purchaser in Idaho or Wyoming."

A Quitclaim Deed not Sufficient.

A full price calls for a perfect title, evidenced by a good and sufficient deed, and not one that suggests doubt and invites litigation, A quitclaim deed does not protect the grantee from latent equities against the estate. Such a deed does not place the vendee in a position of a *bona fide* purchaser without notice.

This Court has uniformly adopted this view, which becomes the rule of decision for the Territories.

In the case of Howard *et al. v.* Piatt 3 (Howard, 333), Justice Story thus clearly announced the rule:

> "Another significant circumstance is that this very agreement contained a stipulation that Oliver should give a quitclaim deed only for the tracts; and the subsequent deeds given by Oliver to him accordingly were drawn up without any covenants of warranty, except against persons claiming under Oliver, or his heirs and assigns. In legal effect, therefore, they did convey no more than Oliver's right, title, and interest in the property; and under such circumstances it is difficult to conceive how he can claim protection as a *bona fide* purchaser for a valuable consideration without notice against any title paramount to that of Oliver, which attaches itself as an unexpected trust to the tracts."
>
> P. 410.

While Justice Swayne reiterates it in the case of May *v.* Le Claire (11 Wallace, 217):

"The evidence satisfies us that Cook had full notice of the frauds of Powers and of the infirmities of Dessaint's title.

"Whether this were so or not, having acquired his title by a quitclaim deed, he cannot be regarded as a *bona fide* purchaser without notice. In such cases the conveyance passes the title as the grantor held it, and the grantee takes only what the grantor could lawfully convey. Cook occupied the same relations to the property as Dessaint, his grantor."

P. 232.

And again, in Baker *v.* Humphrey (101 United States, 494):

"Chapman conveyed by a deed of quitclaim to the attorney's brother. The attorney procured the deed to be so made. It was the same thing in the view of the law as if it had been made to the attorney himself. Neither of them was in any sense a *bona fide* purchaser. No one taking a quitclaim deed can stand in that relation."

May *v.* Le Claire, 11 Wall. 217.
P. 499.
See also Runyon and others *v.* Smith and others, 18 Federal Reporter, 579.

The trial court held a quitclaim deed was not sufficient; that the contract called for a general warranty deed. The supreme court of the Territory rules that a quitclaim was adequate to carry the perfect title and found this adequacy in the statute of 1885–'6, in connection with the prior statutes. The court says:

"By the statute of 1885–'6, above referred to, it is provided that a quitclaim deed purporting to convey the interest of the grantor shall not be held to operate as a conveyance of an after-acquired title unless words are added expressing such intention.

"The operative words of such deed would, in any event, probably preclude the idea of its conveying an after-acquired title; but it is believed that under the statutes of this Territory relating to deeds and to their registration a deed in the form of a quitclaim which purports on its face to convey the real estate would operate to convey even an after-acquired title.

"Such an instrument would be in effect a bargain-and-sale deed."

This statute of 1885–'6 gives the three following forms of deeds, specifically naming and defining the form and effect of each.

Hill's Annotated Statutes and Codes of Washington, vol. 1:

FORM AND EFFECT OF QUITCLAIM DEED.

"§ 1426. Quitclaim deeds may be in substance in the following form: The grantor (here insert name or names and place of residence), for the consideration (here insert consideration), convey and quitclaim to (here insert grantee's name or names) all interest in the following described real estate (here insert description), situated in the county of ———, State of Washington. Dated this — day of ———, 18—, ——. Every deed in substance in form prescribed in this section, when otherwise duly executed, shall be deemed and held a good and sufficient conveyance, release and quitclaim to the grantee, his heirs and assigns, in fee of all the then existing legal or equitable rights of the grantor in the premises therein described, but shall not extend to the after-acquired title unless words are added expressing such intention (January 21, 1886, § 5. In effect immediately)."

FORM AND EFFECT OF BARGAIN AND SALE DEED.

"1425. Bargain and sale deeds for the conveyance of land may be substantially in the following form: The grantor (here insert name or names and place of residence), for (and) in consideration of (here insert consideration), in hand paid, bargain, sell, and convey to (here insert the grantee's name or names) the following described real estate (here insert description, situated in the county of ——, State of Washington. Dated this — day of ——, 18—, ——. Every deed in substance in the above form shall convey to the grantee, his heirs or other legal representatives, an estate of inheritance in fee-simple, and shall be adjudged an express covenant to the grantee, his heirs or other legal representatives, to wit, that any grantor was seised of an indefeasible estate in fee-simple, free from incumbrance, done or suffered from the grantor, except the rent and services that may be reserved, as also for quiet enjoyment against the grantor, his heirs and assigns, unless limited by express words contained in such deed; and the grantee, his heirs, executors, administrators, and assigns, may, in any action, recover for breaches, as if covenants were expressly inserted."

January 21, 1886, §4. In effect immediately.
Hill's Annotated Statutes and Codes of Washington, p. 500.

FORM AND EFFECT OF WARRANTY DEED.

"1424. Warranty deeds for the conveyance of land may be substantially in the following form: The grantor (here insert the name or names and place of residence), for and in consideration of (here insert consideration), in hand paid, convey and warrant to (here insert the grantee's name or names) the following described real estate (here insert description), situated in the county of ———, State of Washington. Dated this — day of ——, 18—, ——. Every deed in substance in the above form, when otherwise duly executed, shall be deemed and held a conveyance in fee simple to the grantee, his heirs and assigns. with covenants on the part of the grantee—

"1. That at the time of the making and delivery of such deed he was lawfully seised of an indefeasible estate in fee-simple in and to the premises therein described, and had good right and full power to convey the same.

"2. That the same were then free from all incumbrances.

"3. That he warrants to the grantee, his heirs and assigns, the quiet and peaceable possession of such premises, and will defend the title thereto against all persons who may lawfully claim the same, and such covenants shall be obligatory upon any grantor, his heirs and personal representatives, as fully and with like effect as if written at full length in such deed. (January 21, 1886, § 3. In effect immediately)."

Hill's Annotated Statutes and Codes of Washington, pp. 499–500.

The act in which these forms are given is entitled "An act concerning conveyance of real estate and providing a form for deeds, mortgages, and certificates of acknowledgments and declaring the effect thereof" it embraces the entire law on these subjects.

Laws of Washington, 1885–6, p. 177.

We submit this legislation necessarily operates to repeal every former statute that would confuse these instruments or destroy their declared force or effect.

Unless each stands for what it purports to be, the object of the enactment has totally failed.

Deed Has Never Been Tendered nor any Sufficient Excuse Given for not Tendering it.

No question has ever been made of a failure to perform on the part of defendant in error. His performance is pleaded in the answer. His right to a deed has been at all times conceded and was testified to, both by the plaintiff in error and his attorneys. From the first, both Ankeny and his attorneys have proceeded on Clark's compliance with the contract and his unquestioned right to a deed. The single difference has been as to the kind of deed.

But no deed of any description has ever been tendered him. None was produced at the trial or deposited in court for him.

Ankeny stipulates that Clark served the following letter upon him :

WALLA WALLA, W. T., *Nov.* 16, 1886.

Levi Ankeny, Esq., Walla Walla, W. T.

DEAR SIR : I have performed my part of the contract in the purchase of the land described in your bond to me. I have learned that you have no title to one hundred and sixty acres of it. You have refused to give me anything more than than a quitclaim deed to this part of the land. I cannot accept such a deed. It was not what the contract called for. Unless within five days from this date you convey a perfect title to me to the whole of the land described in the bond by a good and sufficient conveyance I will, at the end of that time, abandon this land and surrender the possession to you and look to you for such compensation as the law allows me on account of violation of the contract.

Resp'y, V. B. CLARK.

But it elicited no response, and no attention was paid to it.

One of the attorneys of plaintiff in error says a deed was executed and left with him for delivery. He does not testify what character of deed it was, but does testify it was not a warranty deed. He says, after telling defendant in error it was not a warranty deed, the latter said he did not want it ; that he did not know what became of the deed ; that he took no further notice of it and has not looked since the case was commenced, but thinks it may be in the office.

Record, p. 26.

While the other of his attorneys states he was authorized to give a warranty deed for one-half the land and a quitclaim for the railroad land, or a warranty expressing a small consideration, and, if the title failed, defendant in error should obtain title under the homestead or preemption law, but nothing came of this proposition.

Record, p. 26.

Admission and Exclusion of Evidence.

Upon the stipulated facts after the waiver of non-suit the sufficiency of the evidence was a matter of construction and determination for the court, and mere abstract errors in the admission or exclusion of such evidence is not ground for reversal.

Rogers *v.* Borchard, 82 Cal. 347.

To prove compliance with an agreement a deed was offered in evidence to be construed by the court, but was excluded. It being alleged this was error, the appellate court said:

> " When the deed was offered in evidence, and objection made to its introduction, it became the duty of the court to examine it sufficiently to enable it to determine whether it was admissible or not; and if not, to sustain the objection to its introduction in evidence."

P. 350.

While McFarland, concurring, said:

> " I concur in the judgment, because it appears that the deed erroneously admitted in evidence must necessarily have entered largely into the considerations which moved the court to give judgment for respondent. I do not think that Judge Temple intended to say, or did say, in Mason *v.* Wolff (40 Cal. 249), that a judgment must be reversed

for every abstract error committed in ruling upon the admissibility of evidence when the case is tried without a jury; and I fear that the leading opinion in the case at bar might bear that construction."

Greenleaf says (vol. 1, sec. 49) as follows:

"In trials of fact without the aid of a jury, the question of admissibility of evidence, strictly speaking, can seldom be raised; since, whatever be the ground of objection, the evidence objected to must of necessity be read or heard by the judge, in order to determine its character and value. In such cases the only question, in effect, is upon the sufficiency and weight of the evidence. While this language may state the principle too strongly, still, in my opinion, a judgment in a case tried without a jury should not be reversed for the erroneous admission of one piece of evidence, unless the error shows that the case was tried upon a wrong theory, or appears to have been in some way material, important, and clearly prejudicial to the rights of the losing party."

P. 351.

THERE WAS NO LIABILITY FOR RENT.

Defendant in error went into possession of the premises as a proprietor and not as a tenant. He made no agreement to pay rent, and, no relation of landlord and tenant existing between him and plaintiff in error, the law raised no such obligation.

He was entitled to the use of the land, as plaintiff in error had enjoyed that of the purchase money. Interest offset rent.

Bardsley's Appeal, 10 Atlantic, 39.
Fletcher *v.* Button, 4 New York, 598-9.
Gillet *v.* Maynard, 5 Johnson, N. Y. 86.
Cook *v.* Doggett, 2 Allen, Mass. 441.
Tolbrett *v.* Sebree, 1 Dana, Ky. 56.

Shields *v.* Bagliolo, 7 Missouri, 134.
Patrick *v.* Roach, 21 Tex. 251.
Williams *v.* Rogers, 2 Dana, Ky. 374–5.
White *v.* Tucker, 52 Mississippi, 145.
Pence *v.* Langdon, 100 United States Reports, 678.
Wheeler *v.* Brackett and Board, 12 Johnson, N. Y., 363.

Bardsley's Appeal (Penn.) (10th Atlantic Reporter, page 40):

"*Per curiam.* It may be conceded, if one occupy the land of another by consent of the latter, without any agreemeent, that assumpsit for use and occupation will lie. Such, however, is not this case. Here the possession was taken and maintained under an express contract, by which the appellant, in consideration of $8,000 to be paid therefor, agreed to convey to the vendee a certain house free and clear of all incumbrances and title to be perfect.

"At the date of the agreement the vendee paid $500, and was at all times ready to pay the residue of the purchase money on a deed being delivered to him according to the agreement. The vendor was not able to execute a deed according to his contract. These facts show the vendee was not in possession under such circumstances as to create the relation of landlord and tenant. There was neither an express nor implied contract to pay rent, and no action could be maintained to recover for the use and occupation of the premises."

In 52 Miss., White, adm., *et al.*, *v.* Tucker, breach of conditions of title bond for land, the court, at page 147, says:

"It was disclosed on trial that Tucker had paid no mesne profits to the true owner, when evicted by title paramount, it having been expressly agreed between himself and said owner that he should pay none, and this agreement having been embodied in and made a part of the judgment under which he was evicted. Having thus enjoyed possession of the land for many years, and being acquitted of all demands of the use and occupation thereof, can he recover from his vendor interest on the purchase money paid by him?

"The question is one of first impression in this State, but seems abundantly settled elsewhere. It is held interest on the money, and mesne profits of the land, are intended by law as equivalent of each other, and where there has been an acquittance of one the other cannot be recovered.

"We concur in these decisions."

Rawle on Cov. for Title, 93 *et seq.*
Guthrie *v.* Pugsley, 12 Johns. 126.
Patterson *v.* Stewart, 6 Watts. & Serg. 528.
Kyle *v.* Fauntleroy, 9 B. Mon. 620.
Williams *v.* Beeman, 2 Devereux, 485.
Clark *v.* Parr, 14 Ohio, 118.
Flint *v.* Steadman, 36 Vt. 210.

Patrick *v.* Roach (21 Texas, 255):

"Where the purchase-money is paid, and there has been no manifest injustice or fraud by either party, and the vendor is unable to make title, the rule is to restore the land to the vendor without profits, and the purchase-money to the vendee without interest."

2 Dana, 374.

Patterson *v.* Stewart (6 Watt's and Serg. Reports, 527):

"By the breach of a covenant against encumbrances, the purchase-money becomes instantly revendicable, with interest, except for any time during which the purchaser may have been in the perception of profits, actual or potential, which could not be recovered from him. In this instance, though the covenant was broken at the sealing of the deed, the conveyance nevertheless vested the exclusive ownership in the purchaser till it was divested by

the sale on the encumbrance, and to the profits in the mean time the incumbrancer could make no pretension."
P. 528.

In an action on a covenant of warranty of title, when the plaintiff had been evicted, the supreme court of Ohio, in Clark *v.* Parr (14 Ohio, 118), held as follows:

"But in the case at bar the plaintiff occupied the premises from the date of the conveyance, and such enjoyment is considered as equivalent to the interest on the consideration paid."
P. 122.

Cook *v.* Doggett (2 Allen's Reports, 441):

"The judge also correctly instructed the jury that the plaintiff could not recover for the expenses of cutting the hay, as it was not cut at the defendant's request. There was no express or implied undertaking by the defendant to pay for cutting the hay. The work was done, or caused to be done, by the plaintiff for his own benefit, on the faith that the defendant would convey the land agreeably to his oral agreement, which the plaintiff must be supposed to have known he could not by law enforce."

Chief-Justice Burke, in upholding this view of the law in the supreme court of the Territory, observed:

"The fairness and justice of this rule are well illustrated in this case. The vendor was the party in fault throughout; he received the full purchase price for the land according to the terms of his contract; he failed to perform the contract on his part; he never, to this day, formally tendered a deed to defendant in error, and if defendant in error's statements that he would not accept a quitclaim deed be held to excuse plaintiff in error for not tendering a deed before this action was begun it certainly did not excuse his failure to make a tender of a deed of some kind in his answer or to bring a deed into court upon the trial. Yet he did neither the one nor the other. The defendant in error claims interest only from the time when he delivered up possession of the land to plaintiff in error, and that he is justly entitled to."

Record, p. 35.

IT WAS THE VENDOR'S DUTY TO PREPARE THE DEED.

The evidence and course of the parties make it apparent in this case it was the vendor's duty to prepare the deed. Both the parties and their attorneys throughout acted upon that view.

The conditions do not obtain in this country as in England, that makes it incumbent on the vendee to prepare the conveyance.

In Buckmaster *v.* Grundy 1 (Scammon, 310) it was said:

> " With regard to the obligation of the vendee to prepare the deed according to the English authorities referred to, it is to be observed that these decisions were made with reference to the parties under a system of conveying which has grown up there and well understood; but no such system exists here, and parties to a contract for the conveyance of land cannot therefore be supposed to have reference to it as regulating the duty of each with respect to the preparation of the title papers. Whatever, then, may be the practice in England, the purchaser here is not bound to prepare and tender a deed to the vendor unless such obligation can fairly be inferred from the terms of the contract."

Pp. 313 and 314.

And the same court, in Headley *v.* Shaw (39 Ill. 354), reaffirms the rule as follows:

> " A party contracting to execute and deliver a deed is bound to prepare the deed; if there be no agreement it shall be prepared by the other party, and the vendor must

tender it to the vendee before he can demand the purchase-money. This seems to be the rule as established in all courts of law in this country."

P. 366.

ANKENY ACQUIESCED IN THE RESCISSION.

The fact that Ankeny did not tender a deed, that he received the letter of Clark notifying him that unless within five days a valid title with a good and sufficient deed was conveyed he should abandon the land, surrender back the possession, and made no reply to it or gave it no attention, are circumstances to show he consented to the rescission.

Clark states a few days later, in company with Mr. Stanton, a neighbor whom he took along as a witness, he went to Mr. Ankeny, "and I told Mr. Ankeny that I surrendered the land in the bond described to him and quit possession. He said, 'All right.' This was about all the talk."

Record, p. 24.

Mr. Stanton testified:

"Plaintiff said to Ankeny he surrendered the possession of the land back to him and that he went out of possession of it. Ankeny said, 'All right,' and that is about all that was said between them."

Record, p. 24.

While plaintiff in error (Ankeny) testified in chief:

"When plaintiff came and notified me that he tendered me the possession of the land, I may have said, 'Is that all?' or something of that kind." On cross-examination, in answer to the inquiry whether the conversation had not taken place between himself and Clark, as testified to by the other witnesses, he said he supposed they had or substantially so."

Record, p. 25.

He says, it is true, he did not so intend, but does not state he gave any expression to such intention.

Four months elapse from this apparent and expressed acquiescence in the surrender of possession until the commencement of the action, without a word of disaffirmance from Ankeny.

Herberger *v.* Husmann, 24 Pacific Reporter, 1058.

IF A RESCISSION WAS NOT SUFFICIENTLY PLEADED, PLAINTIFF IN ERROR WAIVED THE OMISSION AND IT WAS CURED BY VERDICT.

Except on the ground of departure the sufficiency of the pleadings was not questioned at the trial. Both parties proceeded to contest the question of rescission on its merits. The trial court regarded this issue as fully presented and so determined the cause.

Amendment must have been allowed on the trial, if asked, in order to have the pleadings conform to the proof and the verdict, had their sufficiency been called in question.

There could have been no prejudice or surprise, because a written agreement of the facts in this issue was before the court.

In the trial court plaintiff in error did not object that a rescission had not been properly pleaded, but, regarding that question as being at issue, he *did* complain that the court excluded evidence on his part tending to disprove it.

This is made one of his grounds on a motion for a new trial.

"6. Because the court erred in refusing to allow the defendant to prove that plaintiff did not, at the time he claims that he offered to rescind the contract, tender to defendant or offer to account to defendant for the rent, issues, or profits of said land contracted to be sold during the time he, plaintiff, occupied the same; to which ruling defendant then and there excepted, and the exception was allowed by the court."

Record, p. 20.

And because the court refused the following instruction asked by him:

"'3. Plaintiff could not rescind the contract without accounting or offering to account for the rents and profits of the land agreed to be sold while he was in possession of the same;' to which ruling defendant then and there excepted, and the exception was allowed by the court."

Record, p. 20.

Under the liberal rule of the code, the supreme court of the Territory regarded the amendment as made.

Code of Washington, sections 105, 112, 113.

Pomeroy's Remedies and Remedial Rights (second edition), sec. 435.

Bliss on Code Pleadings, sections 440, 442.

Hodge *v.* Sawyer, 34 Wisconsin 404.

Passenger conductors, etc., *v.* Birnbaum, 11 Atlantic Reporter, 380.

Haverhill & Co. *v.* Prescott, 80 American Decisions, 124.

O'Connell *v.* Cotter, 44 Iowa, 50.

Doty *et al.* *v.* Regour & Co., 9 Ohio State, 626.

CANCELLATION OF THE BOND.

Upon the trial plaintiff in error offered thirteen instructions to the jury, none of which related to the release or cancellation of the bond.

Record, pp. 13 and 14.

In the motion for a new trial he makes nineteen specifications of alleged error on the part of the court as reasons for granting a new trial. The release or cancellation of the bond is not mentioned.

Record, pp. 19-22.

The contention that plaintiff in error is entitled to a release of the bond is answered in the opinion of the lower court, as follows :

" But it is contended that in any event, upon a rescission of the contract by defendant in error, plaintiff in error was entitled to have a release or cancellation of the bond which he had given for the land.

" In this contention plaintiff in error is right. A bond like the one in this case is, under sec. 2311 of the code, an incumbrance upon real estate, and if plaintiff in error is to be put in as good condition as he was before the sale, the bond must be cancelled. We think, however, that an affirmance of the judgment of the district court would operate to extinguish whatever right or title under the bond remained in defendant in error and in effect cancel the bond.

" Pence *v*. Langdon, 99 U. S. 578.

" American Wine Co. *v*. Brasher Bros., 13 Federal Reporter, 595.

" Besides, under section 475 of the Code of Washington, the court has power to reverse, affirm or modify the judgment of the court below, and to prevent the possibility of harm to the plaintiff in error from this bond the court will order the judgment below modified so as to require defendant in error, before an execution shall issue upon the judgment, to make and execute a proper and sufficient release or cancellation of the bond and deposit the same with the clerk of the court for the use of plaintiff in error. It should be observed here that the record nowhere shows that plaintiff in error ever made any complaint of the failure to release or cancel this bond before coming to this court, and there can be no doubt upon the evidence that the failure to cancel it was unintentional on the part of the defendant in error. The cause will be remanded to the court below with instructions to modify the judgment in accordance with this opinion—that is to say, the judgment will be modified only so far as to suspend the issuance of execution until the defendant in error shall execute a proper and sufficient release or cancellation of the bond mentioned in this case and deposit such release or cancellation with the clerk of the district court for the use of the plaintiff in error.

"THOMAS BURKE,
"*Chief Justice.*

" We concur.
"FRANK ALLEN,
"*Associate Justice.*
" L. B. NASH,
"*Asso. Justice.*"
Record, pp. 34, 35, 36.

Besides, the acquiescence of plaintiff in error in the rescission and surrender of possession should estop him from first raising this objection in the appellate court.

JOHN B. ALLEN,
Attorney for Defendant in Error.

Transcripts
of
Records

1892

838

Supreme Court U. States

148 U.S.

266
~~270~~ – 345

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